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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 566

WARD TRANSPORT, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the District of Colorado

STATEMENT AS TO JURISDICTION

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---

STATEMENT OF APPELLANTS AS TO JURISDICTION

Appellants appeal from the judgment of the United States District Court for the District of Colorado, entered on November 1, 1954, sustaining an order of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of Colorado is reported in 125 F. Supp. 363 and is appended hereto as Exhibit A. The opinion of the Interstate Commerce Commission, Division 2, is reported in 289 I.C.C. 457 and is appended hereto as Exhibit B. The lower court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought under 28 U.S.C., Section 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on November 1, 1954 and Notice of Appeal was filed in that court on December 1, 1954. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567; *Eastern-Central Association* v. *United States*, 321 U.S. 194; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499.

QUESTIONS PRESENTED

1. Is an order of the Interstate Commerce Commission approving reduced railroad rates on petroleum products (gasoline and light oils) made 1½ cents per hundred pounds below prevailing motor carrier rates for hauls of over 75 miles which is based on a finding that railroad costs in transporting the particular traffic involved in tank cars between particular points in a limited area involved are below the motor carrier costs of transporting the traffic

for corresponding hauls, supported by substantial evidence when the *only* evidence as to railroad costs consists of average car-mile and ton-mile costs for entire railroad systems in transporting all traffic for all distances.

2. Does a showing as to railroad costs in the form just stated constitute substantial evidence to support a finding that proposed reduced railroad rates based 1½ cents per hundred pounds lower than prevailing motor carrier rates are not compensatory for hauls of under 75 miles and are compensatory for hauls of over 75 miles.

3. Does an order of the Commission approving reduced railroad rates as above-described conform to the National Transportation Policy

(a) when the findings of the Commission relate only to the effect of the approved rates on railroads and their traffic and there are no findings as to the effect thereof on motor carriers or their traffic; and

(b) when there is no finding with respect to the effect of the approved rates on the operations and services of appellants as a part of a national system of transportation by highway, as well as by rail, adequate to meet the needs of the commerce of the United States and of the national defense.

4. Is an order of the Commission which based its approval of reduced railroad rates made 1½ cents per hundred pounds below prevailing motor carrier rates on the fact that at a parity of rates the preponderance of traffic within the area involved moves by motor carrier, plus a statement by railroad witness that in their judgment a 1½ cent rate advantage is necessary to induce shippers to use rail service in lieu of motor carrier service, supported by substantial evidence when the record shows without dispute

(a) that on a system basis the railroads involved actually terminated more petroleum products in 1950

than in 1940 or 1935, and this in the face of a lessened supply of tank cars;

(b) that the tank cars used are not supplied or controlled by railroads but are owned by shippers or leased by shippers from private tank car companies so that the shippers control the area in which such tank cars are used;

(c) that tank cars on a nation-wide basis are being used by shippers more nearly to capacity in 1950 than at any time in history exclusive of wartime or like unusual conditions; and

(d) that the actual experience of motor carriers by tank truck is that shippers will not pay a premium of 1½ cents for tank truck transportation and that, when rail rates are lower than tank car rates, shippers invariably will use rail service to the full extent that tank cars can be secured.

5. May evidence and findings in other cases involving the relation of rail rates on petroleum products to rates of motor carriers in other areas be treated by the Commission as evidence which supports the assailed order.

STATUTES INVOLVED

The National Transportation Policy preceding Section 1 of the Interstate Commerce Act, as amended, and Sections 1(4), 1(5)(a) and 15(7) of the Interstate Commerce Act, as amended (49 U.S.C., note preceding Section 1, and Sections 1(4), (5)(a), and 15(7)), are set forth in Appendix C hereto.

STATEMENT

Appellants are seven common carriers by motor vehicle engaged in the transportation of petroleum products (gasoline and light oils) by tank truck as authorized within particular areas by the Interstate Commerce Commission. In October, 1950, ten railroads operating in Colorado, Wyo-

ming, western South Dakota, western Nebraska, and western Kansas, which were the corporate defendants in the lower court, filed tariffs with the Commission in which they proposed reductions in interstate rates maintained by them on petroleum products in tank car loads from refineries and pipeline terminals in Colorado and Wyoming to destinations in the states and portions of states above-named. The proposed reduced railroad rates were made 1½ cents per hundred pounds below the prevailing tank truck rates from and to the same points for the alleged purpose of meeting motor truck competition. Upon protest by appellants, said rates were suspended by the Interstate Commerce Commission pursuant to the authority conferred on it by Section 15(7) of the Interstate Commerce Act, as amended, in a proceeding entitled "*Petroleum from Colorado and Wyoming to W.T.L. Territory, I.&S. Docket No. 5853.*" Thereafter, hearing was had, the case was briefed, the Hearing Examiner filed his proposed report to which appellants excepted, the case was orally argued and a decision entered by the Interstate Commerce Commission, Division 2 (Commissioner Alldredge dissenting), on June 30, 1953. By its decision, the Commission found that for hauls of under 75 miles the railroads had not justified reduced rates below the prevailing rates of motor carriers, but that for hauls of over 75 miles the proposed rates were justified to the extent that they were not more than 1½ cents below the prevailing tank-truck rates from and to the same points. The Commission predicated this ultimate conclusion on preliminary findings reading as follows:

> "This proceeding is part of a general effort by the railroads to regain some of the refined petroleum traffic. It is impossible generally for the railroads to compete with the pipe lines, but there are reasonable grounds for the belief that they may continue to com-

pete profitably with the tank-truck carriers within certain limitations. The record clearly shows that under an equal basis of rates in this territory the tank trucks have gradually taken over the movements, in Colorado, for example, up to 92.5 percent of the total traffic. In other territories where reduced rail rates have been filed to meet tank-truck competition, the Commission has found as a fact that the railroads cannot compete successfully with the tank-truck carriers at equal rates. The record is convincing that in the territory here considered the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory, except for the shorter hauls.

"The evidence before us, including the costs of the tank-truck carriers as shown by the protestants, is convincing that for hauls below about 75 miles the tank-truck costs are lower than those of the rail carriers, and that for the longer hauls the reverse is true. It thus appears that for the shorter hauls the motor carriers have an inherent advantage in cost over the rail carriers, and that the reverse is true for the longer hauls. There is no evidence before us that the respondents could operate under the proposed rates for the shorter hauls without casting a burden upon other traffic. In these circumstances, approval of the proposed rates for the shorter hauls would run counter to the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation so as 'to recognize and preserve the inherent advantages of each.'

"We are of the opinion that the respondents' rates on this traffic for short-line distances under 75 miles should be no lower than the corresponding rates of the tank-truck carriers, and that for the longer hauls their rates should in no instance be lower than 1.5 cents under the prevailing tank-truck rates from and to the same points."

In pursuance, by order originally effective August 7, 1954, the Commission directed the cancellation of the proposed schedules and the discontinuance of proceedings with-

out prejudice to the establishment of rates in conformity to views expressed in the Commission's report. On January 5, 1954, appellants' petition for reconsideration was denied by the Commission.

Thereupon, appellants brought this action to have the order of the Commission set aside against the United States of America, the Interstate Commerce Commission, and the ten railroads above referred to. The Commission from time to time postponed the effective date of its order pending the disposition of the case by the lower court. The lower court in its opinion of November 1, 1954, sustained the decision and order of the Commission as conforming to law and supported by substantial evidence.

As to the matter of relative costs, the court found that general average unit costs per car-mile and per ton-mile expressed in a single figure for all traffic moving in all types of equipment for all distances on a system-wide basis, as computed from railroad annual reports to the Commission, were sufficient to permit the determination, for both the shorter as well as the longer hauls, of the varying relations of railroad costs to tank truck costs in transporting the single commodity, petroleum products, moving for various distances in tank cars from and to the points involved in the limited area embraced within the case.

The court also found that the Commission gave adequate attention to the National Transportation Policy when it found that railroads cannot compete successfully with tank trucks at equal rates and that the railroad rates proposed were not lower than necessary to meet the truck competition for hauls longer than 75 miles. This was found sufficient even though the Commission said nothing as to the ability of tank trucks to compete with railroads in the face of a 1½ cent differential as approved by the Commission, nor made any finding as to the probable effect of the

rates approved on the ability of appellants to function, or as to the need of developing and preserving the tank truck services of applicant in the area involved for the sake of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense.

The court further held that it was within the competence of the Commission to refer to experience in other cases as a guide for the application of its expert knowledge in determining a lawful relation of rail rates to tank truck rates in the area involved in the instant case.

As to the finding of the Commission that the proposed rates for hauls of over 75 miles when made 1½ cents below prevailing tank truck rates were not lower than necessary to meet the tank-truck competition, the court held that there was substantial support in the evidence because it showed that with a rate parity the tank trucks carried the preponderance of the traffic in the area involved in 1950. The lower court in effect rejected appellants' contention that the evidence mentioned did not provide substantial support for the Commission's findings approving a 1½ cent differential in favor of railroads because

> (a) the undisputed evidence showed that on a system basis the railroads involved actually terminated more petroleum products in 1950 than in 1940 and 1935, and this in the face of a lessened supply of tank cars;
>
> (b) that tank cars are not supplied by or controlled by railroads; that they are owned by shippers or leased by shippers from private tank car companies; that wherever used, the railroads simply pay a mileage allowance for the facility furnished by the shipper; and that such tank cars and the areas in which used are controlled by shippers.
>
> (c) that the tank car fleet so controlled by shippers is being used on a national basis more nearly to

capacity in 1950 than in any time in history, exclusive of war time; and

(d) that the actual experience of motor carriers by tank truck as shown by the undisputed evidence of all of appellants' witnesses is that shippers will not pay a premium of 1½ cents per hundred pounds for tank truck transportation and when there is a rate differential in favor of railroad service, shippers will invariably use such service to the full extent that tank cars can be secured.

The circumstances just noted, which are not in dispute, were heavily relied upon by appellants to prove the lack of substantial evidence to support the final decision of the Commission but were not dealt with in the findings of the Commission and that deficiency is passed by without comment in the decision of the lower court.

THE QUESTIONS ARE SUBSTANTIAL

1 and 2. In recent years, a very large proportion of the rate cases submitted to the Commission involve the making of competitive rates by carriers of different types. This part of the Commission's business is constantly on the increase. One circumstance which is in the forefront of all such cases is the relative cost of transportation by one mode as compared with another (*Cf. Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947)). The approval or disapproval of a particular method of determining transportation costs in a rate case is ordinarily within the final say-so of the Commission. But the Commission acts beyond its authority when, in determining such costs, it relies on evidence which, as a matter of law, is not relevant or material to the issue.

In this case, the Commission acted without substantial evidence in its determination of railroad costs because it based its decision on general average car-mile and ton-

mile costs of transporting all traffic for all distances on a system-wide basis. The Supreme Court has held that evidence of such a character provides no support for the determination of point-to-point costs in transporting a particular commodity for a particular distance. In *Northern Pacific R.R. Co.* v. *Department of Public Works*, 268 U.S. 39, 43-44 (1925), was under review an order of an administrative agency fixing point-to-point rates on a particular commodity upon a consideration of the average system costs of transporting all traffic. In setting that order aside for lack of substantial support in the evidence, the Supreme Court said:

> A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul;[5] in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. The Department's error was fundamental in its nature. The use, of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion.

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[5] On the Northern Pacific the average length of haul of all its intrastate traffic in Washington was 99 miles; of all its traffic in Washington, interstate and intrastate, 142 miles; of all its traffic on the whole system, 334 miles. Compare *Shepard* v. *Northern P. R. Co.*, 184 Fed. 765, 781, 782.

The decision of the Commission in the instant proceeding, and the action of the lower court in sustaining that order, are contrary to the rule of the case just cited.

Because of the great public interest in the many cases before the Commission involving the making of inter-carrier competitive rates in which relative costs are an important factor, it is exceedingly important that the Commission exercise its discretion in making findings as to relative costs in a rational and reasonable manner. If the Commission, just because it is an expert body, is allowed to base determinations of carrier costs for hauls of varying lengths in the transportation of a particular commodity between particular points on unsifted averages of the character above described, the contesting parties will never have an opportunity to come to grips with the costs directly associated with the particular hauls and services involved.

3. The National Transportation Policy by its terms does not permit the Commission, in passing upon proposed reductions in railroad rates alleged to be necessary to meet motor carrier competition, to consider only the interests of railroads. The National Transportation Policy requires fair and impartial regulation of *both* modes of transportation. It requires rates to be fixed so as to foster sound economic conditions in transportation and among the several carriers, *including motor carriers*. It directs the establishment and maintenance of reasonable charges without unfair or destructive competitive practices. The Act is to be administered and enforced for the purposes stated to the end of developing and preserving a transportation system *by highway* as well as by rail, adequate to meet the needs of commerce and of the National Defense. It is not enough that the Commission consider what rate relation will permit railroads to compete; it must also con-

sider, at the same time, what rate relations will permit motor carriers to compete and to function in the fashion contemplated by the National Transportation Policy. Otherwise, the Commission fails to provide the "fair and impartial regulation of all modes of transportation" required by the National Transportation Policy.

The effect of the approved rates on the motor carrier service in the area involved is of great public importance. The evidence shows that shippers will not pay a 1½ cent per hundred pound premium for motor-carrier service if they can secure tank cars to move their traffic by railroad. Consequently, it is essential that the Commission consider and determine what traffic will be left for motor carriers under the approved rate relation and whether such remaining traffic will sustain a motor carrier service in the territory adequate to meet the needs of commerce and of the national defense. The lower court erred in not setting aside the order for lack of findings in respect to these matters.

The Commission's report is written wholly from the railroads' standpoint. It contains no finding whatsoever as to the effect on motor carriers or as to the need for motor carrier service. A similar lack of findings in a Commission report reviewed in *Cantlay and Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (1953), caused the District Court, three judges sitting, to set that order aside. The Commission and the United States elected not to appeal that case to the Supreme Court.

The need for requiring the Commission to accept the guidance of the National Transportation Policy in cases involving the making of inter-carrier competitive rates is clear (*Cf. East-Central Association* v. *United States*, 321 U.S. 194; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567). The failure of the Commission to give recognition to the National Transportation Policy as it ap-

plies to the motor carrier appellants and their operations in the territory involved in the instant case presents a substantial question which warrants full consideration by the Supreme Court.

4. When the legal relevancy of the evidence to the issues is not open to dispute, the question of whether substantial evidence supports the finding of an administrative agency should ordinarily be treated as settled by the opinion of the lower court. However, in the instant case the lack of substantial support in the evidence for the finding that rail rates 1½ cents below prevailing motor carrier rates are not lower than necessary to meet tank-truck competition presents a question which takes on added substantiality and public importance when considered with the other questions presented. This is because, if appellants are right as to the errors complained of in respect to the insubstantiality of the cost evidence, and as to the failure of the Commission to recognize in its findings the relevant factors of the National Transportation Policy which pertain to motor carrier service, then the Commission's decision shows an arbitrary acceptance of railroad views and contentions. Such an approach could only lead to a like arbitrary acceptance of railroad contentions as to competitive need for the rates which they propose, even though contrary to the evidence.

That the Commission was arbitrary is plain from its ready acceptance of self-serving opinions of railroad witnesses and its failure to base findings on the evidence given by motor carrier witnesses from actual experience as to the effect on motor carrier traffic of rates differentially higher than rail rates. The fact that the larger share of the traffic in petroleum products in the area involved moved by motor carrier in 1950, when motor carrier rates and rail rates were equal, simply reflects the fact that shippers

elected to use the tank cars owned or leased by them in some other territory for railroad hauls between other points.

The fact stated does not prove, even circumstantially, that railroads must be favored with a 1½-cent differential in order to compete, or that motor carrier operations could survive on the 1½-cent higher rate basis. In fact all of the evidence based on actual experience with traffic movements when tank-truck rates have been higher than rail rates is to the effect that shippers will not pay a premium for motor carrier service if they can secure tank-cars in which to move their products. The lower court should have set the order aside for lack of substantial evidence to support the finding as to the competitive necessity for rail rates 1½ cents per hundred pounds lower than prevailing motor carrier rates.

5. The final circumstance which shows the insubstantiality of the evidence to support the Commission's finding and order involves its recital in general terms of experience in other cases in other unnamed territories as grounds for the establishment of a 1½-cent differential in favor of railroads in the territory involved. In the instant case, the lower court in dealing with this matter said:

> • • • The Commission is an expert body within its field. Part of that experience comes from its experience in previous cases. Certainly, in our opinion, the Commission has a right to refer to experiences in other cases as a guide for the application of its expert knowledge in a particular case. See *United States* v. *Pierce Auto Freight Lines, supra*, 529.

However, the Supreme Court has held that the Commission is not entitled to treat as evidence facts or circumstances not shown in the testimony in the record on which its order purports to be based. *Interstate Commerce Commission* v.

Louisville & N. R. Co., 227 U.S. 89, 91, 93 (1913), *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 288, 290 (1924). In other cases involving a review of Commission orders, lower courts have held that facts shown in one rate case, or findings made therein, do not constitute evidence in a separate and distinct case involving other rates. *Erie R. Co.* v. *United States*, 59 F. Supp. 748, 750 (1944), *Erie R. Co.* v. *United States*, 64 F. Supp. 162, 164 (1945). The lower court erred in not following the rule of the cases cited.

It is submitted that the decision of the District Court fails to recognize and enforce the limitations on the authority of the Commission imposed by the Interstate Commerce Act as construed by the Supreme Court and for that reason the judgment should be reversed and the Commission's order should be enjoined and set aside. We believe the questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

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APPENDIX A

IN THE

United States District Court

FOR THE

DISTRICT OF COLORADO

WARD TRANSPORT, INC., a Colorado corporation; T. CLARENCE BRIDGE and HARRY W. BRIDGE, d/b/a BRIDGE BROTHERS; GROENDYKE TRANSPORT, INC., an Oklahoma corporation; EARL HOUK, d/b/a WESTERN NEBRASKA TRANSPORT SERVICE; FRANK C. KLEIN & CO., INC., a Colorado corporation; MELTON TRANSPORT COMPANY, a Wyoming corporation; R. B. (DICK) WILSON, a Colorado corporation, Plaintiffs, BARLOW'S SERVICE INC., Intervenor, vs. UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a corporation; CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation; THE COLORADO AND SOUTHERN RAILROAD COMPANY, a corporation; THE COLORADO & WYOMING RAILWAY COMPANY, a corporation; THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation; THE GREAT WESTERN RAILWAY COMPANY, a corporation; MISSOURI PACIFIC RAILROAD COMPANY (GUY A. THOMPSON, Trustee), a corporation; UNION PACIFIC RAILROAD COMPANY, a corporation, Defendants.	Civil Action No. 4595

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Douglas McHendrie, 730 Equitable Building, Denver, Colorado; S. R. Brittingham, Jr., 80 East Jackson Blvd., Chicago 4, Illinois; F. O. Steadry, 400 West Madison Street, Chicago 6, Illinois; W. V. Hodges, Jr., 947 Equitable Building, Denver, Colorado; Harry E. Boe, 139 West Van Buren, Chicago, Illinois; John C. Street, 615 C. A. Johnson Building, Denver, Colorado; Robert F. Welborn, 307 First National Bank Building, Denver, Colorado; H. M. Boyle, 604 Rio Grande Building, Denver, Colorado; M. B. Holt, Jr., 208 Colorado National Bank Building, Denver, Colorado; J. W. Preston, Thatcher Building, Pueblo, Colorado; Toll R. Ware, Missouri Pacific Building, St. Louis 3, Missouri; E. G. Knowles, 301 International Trust Building, Denver, Colorado; Elmer B. Collins, Omaha 2, Nebraska; James A. Gillen, 547 West Jackson Blvd., Chicago 6, Illinois, Attorneys for Defendant Railroads.

Before PHILLIPS, Chief Judge; PICKETT, Circuit Judge, and KNOUS, District Judge

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KNOUS, Chief Judge.

This is an action brought by Ward Transport, Incorporated, and six other motor carriers against the United States, the Interstate Commerce Commission and ten defendant railroad corporations to enjoin, set aside and annul the report and orders entered by the Commission in a proceeding entitled, "Investigation and Suspension Docket No. 5853, Petroleum from Colorado and Wyoming to Western Truck Line Territory." Since the filing of the action Barlow's Service Inc., another tank-truck carrier operating in the above area has been permitted to intervene as a plaintiff pursuant to Rule 24 (c)F.R.C.P.

The railroads filed tariffs with the Commission in October 1950, reducing the tank car rates on refined oil, principally gasoline and distillate fuel oil from refinery points and pipe lines in Colorado and Wyoming to destinations in Colorado, Wyoming, South Dakota, Nebraska and Kansas. The proposed rates were generally 1.5 cents per hundred pounds less than published motor carrier rates between the same points. There were instances in which that basis varied slightly but such exceptions are not material here. The truck carriers filed an objection with the Commission on September 21, 1950, requesting it to suspend the proposed rates and enter into an investigation concerning their lawfulness. The proposed tariffs were suspended by the Commission and the defendants voluntarily postponed the effective date of the tariffs beyond the seven-month period provided for in the Act. 49 U.S.C.A., §15(7). After the hearing, the examiner filed his proposed findings and recommendations. Oral argument

was had before the Commission on December 17, 1952. In the report which followed, the Commission, *inter alia*, found as follows:

> "This proceeding is part of a general effort by the railroads to regain some of the refined petroleum traffic. It is impossible generally for the railroads to compete with the pipe lines, but there are reasonable grounds for the belief that they may continue to compete profitably with the tank-truck carriers within certain limitations. The record clearly shows that under an equal basis of rates in this territory the tank trucks have gradually taken over the movements, in Colorado, for example, up to 92.5 percent of the total traffic. In other territories where reduced rail rates have been filed to meet tank-truck competition, the Commission has found as a fact that the railroads cannot compete successfully with the tank-truck carriers at equal rates. The record is convincing that in the territory here considered the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory, except for the shorter hauls.
>
> "The evidence before us, including the costs of the tank-truck carriers as shown by the protestants, is convincing that for hauls below about 75 miles the tank-truck costs are lower than those of the rail carriers, and that for the longer hauls the reverse is true. It thus appears that for the shorter hauls the motor carriers have an inherent advantage in cost over the rail carriers, and that the reverse is true for the longer hauls. There is no evidence before us that the respondents could operate under the proposed rates for the shorter hauls without casting a burden upon other traffic. In these circumstances, approval of the proposed rates for the shorter hauls would run counter to the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation so as 'to recognize and preserve the inherent advantages of each.'
>
> "We are of the opinion that the respondents' rates on this traffic for short-line distances under 75 miles

should be no lower than the corresponding rates of the tank-truck carriers, and that for the longer hauls their rates should in no instance be lower than 1.5 cents under the prevailing tank-truck rates from and to the same points."

In pursuance, the order of the Commission cancelled the proposed schedules and the proceedings were discontinued without prejudice to the establishment of rates in conformity with the views expressed in the Commission's report. On January 5, 1954, the Commission denied plaintiff's petition of reconsideration and reargument and this action was instituted thereafter.

Thereby, among other things, questions are raised as to the sufficiency of the evidence to support the foregoing finding that the rail rates in concern are reasonable on the basis of being compensatory and that the competitive situation justified such rates under the National Transportation Policy.

It is settled law that the orders of the Interstate Commerce Commission are final unless they are beyond its statutory or constitutional power, or based upon a mistake of law. In determining the latter question, an order may be set aside if the rate is so low as to be confiscatory or if the Commission acts arbitrarily and fixes rates contrary to the evidence or without evidence to support them, or if it exercises its authority in an unreasonable manner. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U.S. 541, 547; *Petroleum Products in Illinois Territory*, 280 I.C.C. 681, 685; *Petroleum Products from Los Angeles, Arizona and New Mexico*, 280 I.C.C. 509, 516.

The courts have also recognized the technical and the complex nature of rates and have approved them when

there is "a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Co.* v. *United States,* 292 U.S. 282, 286; *Virginian Railway Co.* v. *United States,* 272 U.S. 658, 663. See also *New York* v. *United States,* 331 U.S. 284, 346; *Board of Trade of Kansas City* v. *United States, supra; United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344, 352; *Manufacturers Railway Co.* v. *United States,* 246 U.S. 457, 481.

In the latter case the Court said:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 170), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

Considered on this basis, it is our opinion that the record and evidence abundantly justify the finding of the Commission that in the movements here involved the railroads cannot compete with the tank-truck carriers on a parity of rates.

Such appears from the undisputed evidence that in Wyoming and Colorado crude oil pipe lines have been built from the producing fields, extending from the most northerly producing field, the Elk Basin, to the east, south and west. Such pipe lines serve refineries located at Lovell, Zube, Thermopolis, Casper, Glenrock, Sinclair, and Cheyenne, Wyoming and Denver, Colorado. Product pipe lines have been constructed from Casper to Cheyenne, and to Denver, and from Borger, Texas to La Junta and

Denver, Colorado. As a result the hauls of gasoline and light oils have been greatly decreased. Between 1940 and 1949, the number of barrels of crude oil refined in the State of Colorado increased 91 percent and in Wyoming 91 percent. In 1935, the total consumption of gasoline in Colorado was 178,000,000 gallons. Of that total, 14 percent was handled by trucks and 86 percent was handled by rail carriers. In 1947, just before the pipe lines were completed into Colorado, the total consumption had increased to 373,000,000 gallons, of which trucks handled 66.9 percent and rail carriers 33.1 percent. By 1950, the consumption had increased to 450,000,000 gallons, of which 92.5 percent was handled by trucks and 7.5 percent by rail carriers. Stated another way, of the total consumption in 1935 of 178,000,000 gallons, the railroads handled 153,000,000 gallons. Of the total consumption in 1950 of 456,000,000 gallons, the railroads handled only 34,000,000 gallons.

The same relative changes in the amounts of gasoline and other fuel products transported from Wyoming and Colorado to Western Nebraska by tank truck and railroads has taken place between 1940 and 1950. (1)

(1)

	1940		1945		1949	
Product	Rail	Truck	Rail	Truck	Rail	Truck
Allison, Nebraska						
Gasoline	759,309	173,790	1,665,772	505,611	47,650	2,595,579
Other fuel	--------	--------	3,036,402	369,624	21,735	1,832,041
North Platte, Nebraska						
Gasoline	1,683,802	547,945	701,209	1,132,097	475,328	930,156
Other fuel	--------	--------	161,058	272,992	139,532	209,612
Scottsbluff, Nebraska						
Gasoline	1,752,739	1,560,443	950,721	1,312,688	8,066	4,942,368
Other fuel	--------	--------	357,166	884,027	19,683	2,123,057

Passing now to the matter of the rates involved.

The finding by the Commission that for hauls below 75 miles, the tank truck costs are lower than those of the rail carriers and that for the shorter hauls the motor carriers have an inherent advantage in costs over the rail carriers was established by the cost averages introduced by the truck carriers and was favorable to the protestants below, plaintiffs here. The evidence introduced by the truck companies also established that for distances over 75 miles the truck costs are higher than the present rail and truck rates and hence the finding of the Commission "that for the longer hauls the reverse is true."

The railroads introduced evidence warranting the conclusion that a lower rail rate was necessary in order to compensate the shippers for inadequate allowances made by the railroads for tank car rentals and the shippers' costs for private unloading tracks and other necessary facilities for rail transportation.

It is true that the railroads did not submit a detailed cost study purporting to show the precise cost of handling petroleum traffic in the area. However, by stipulation of the parties the Commission had before it the annual, quarterly and monthly operating reports, the commodity reports and the operating expense and revenue reports of the defendant railroads on file with the Commission. It also had before it an exhibit showing revenue and expense statistics for each of the railroads, showing the cost of handling all traffic, including car-mile and ton-mile costs and the costs of handling all traffic on an "added traffic" basis, which is generally accepted to be about 50 percent of the cost of handling all traffic. Such exhibit shows that the costs of the defendant railroads range from 23 to 32 cents per car-mile and from 7.8 to 11.2 mills per ton-mile.

and that earnings under the proposed rail rates would average approximately 58 cents per car-mile and 22 mills per ton-mile. Thus, it will be seen, the average earnings on the traffic would be approximately double the cost of handling all traffic and that a detailed cost analysis was not necessary to sustain a conclusion that the proposed rates for distances greater than 75 miles would exceed costs and therefore be compensatory. Moreover, the railroad companies' witness, Nelson, General Fuel Traffic Manager of the Chicago, Burlington & Quincy Railroad, testified that as a result of his study it was his opinion that the rates would be compensatory. (Tr. 22, 23, 24.) That evidence, together with the evidence of the trucking companies that their costs for distances beyond 75 miles exceed their rates and the like railroad rates is sufficient evidence to support the Commission's findings. See *Illinois Commerce Commission* v. *United States*, 292 U.S. 474.

Further, it was not necessary for the Commission to make a relative cost of service finding in order to prescribe a differential between rail rates and truck rates. See *Alabama Great Southern R. R. Co.* v. *United States*, 340 U.S. 216, 223-225.

We also believe the report of the Commission shows that it gave adequate consideration to the national transportation policy.

The plaintiffs next contend that the Commission's report and order are not supported by adequate findings. In answer to this contention it seems sufficient to say that the Commission by its positive findings impliedly made the negative findings which the truck companies insist should have been made. Further, the Supreme Court has held that the Interstate Commerce Act does not compel the Commission to make detailed findings of fact except in a

case where damages are awarded, but only requires the Commission to file a written report stating its conclusions, together with its decision and order, and where the Commission sufficiently discloses the essential basis of its judgment in its report the Court will not set that report aside. *Alabama Great Southern Railroad Co.* v. *United States, supra*, 227-228; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535.

The plaintiffs further complain that the report improperly referred to and relied upon similar findings in similar proceedings which determined questions of competitive petroleum rates as between motor and rail carriers, but which were not involved in the instant proceeding. The Commission did refer to other like cases in its report, but in so doing it did not decide the instant case on facts established in the other cases. Its findings demonstrate that the factual basis for its order was the record before the Commission in the present case. The Commission is an expert body within its field. Part of that experience comes from its experience in previous cases. Certainly, in our opinion, the Commission has the right to refer to experience in other cases as a guide for the application of its expert knowledge in a particular case. See *United States* v. *Pierce Auto Freight Lines, supra*, 529.

It is our conclusion that the findings of the Commission are based on the record in the instant case and are supported by substantial evidence; that the decision is not contrary to law and is in no respect arbitrary or capricious, and that the relief sought by the truck companies must be denied. Judgment will be entered accordingly.

Dated at Denver, Colorado, this first day of November, A. D. 1954.

/s/ ORIE L. PHILLIPS.
ORIE L. PHILLIPS, Chief Judge,
United States Court of Appeals,
Tenth Circuit.

/s/ JOHN C. PICKETT.
JOHN C. PICKETT, Circuit Judge,
United States Court of Appeals,
Tenth Circuit.

/s/ WILLIAM LEE KNOUS.
WILLIAM LEE KNOUS, Chief
Judge, United States District Court.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 5853[1]

PETROLEUM FROM COLORADO AND WYOMING TO W. T. L. TERRITORY

Submitted December 17, 1952. Decided June 30, 1953

Proposed reduced rates on gasoline and light oils, in tank-car loads, from points in Wyoming and Colorado to destinations in Wyoming, Colorado, and western portions of South Dakota, Nebraska, and Kansas, found not shown to be just and reasonable. Proposed schedules ordered canceled and proceeding discontinued, without prejudice to filing of new schedules in conformity with findings made.

H. M. Boyle, Elmer B. Collins, P. F. Gault, Walter McFarland, and *James A. Gillen* for respondents.

Ralph Sargent, Jr., and *Thomas S. Wood* for Public Utilities Commission of the State of Colorado.

Albert L. Vogl, Joseph L. Minihan, John S. Burchmore, Nuel D. Belnap, and *Robt. N. Burchmore,* for protestant tank-truck carriers.

H. W. Prickett, S. J. Gardner, C. A. Grant, D. G. Gilman, and *J. A. Bruso* for certain shippers.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS ALLDREDGE, SPLAWN AND ELLIOTT BY DIVISION 2:

Exceptions were filed by the protestants to the report proposed by the examiner, the respondents replied thereto,

[1] This proceeding embraces also fourth section application No. 25362, Petroleum from Colorado and Wyoming to W. T. L. Territory.

and the issues were orally argued. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on October 1, 1950, and later, the respondent railroads proposed reduced rates on gasoline and light oils, in tank-car loads, from pipeline terminals and refineries in Wyoming and Colorado to destinations in Wyoming, Colorado, and the western portions of South Dakota, Nebraska, and Kansas. Upon protest of for-hire tank-truck carriers, the operation of the proposed schedules was suspended by this Commission and also by the regulatory commissions of Wyoming and Colorado. By voluntary action of the respondents, the effective date of the schedules has been further postponed pending the decision in these proceedings. The hearing was conducted under the cooperative plan, and was held jointly with the Colorado commission. A separate and further hearing was held before the Wyoming commission. The hearing also embraced fourth-section application No. 25362, in which the respondents seek authority to maintain higher rates from and to intermediate points than are here proposed from or to more distant points.

The proposed reduced rates were published by the respondents in an effort to meet motor-carrier competition and to regain, if possible, some of the traffic which has been lost to the motor carriers, particularly for hauls less than 200 miles. Prior to World War II, most of the gasoline and light-oil traffic in this territory was transported by the railroads. Due to severe motor-carrier competition, the movement of the traffic has continued to diminish in volume over the respondents' lines, in contrast to an in-

crease in the volume of consumption in Colorado and Wyoming and in the volume of the movement transported by respondents' competitors. Upon investigation, the respondents concluded that a parity in the rail and motor rates on petroleum products would not place the former on a competitive basis with the tank-truck carriers. Hence, the proposed schedules were filed.

During the last 20 years, important changes have taken place in the methods used in transporting petroleum and its products. There has been a gradual increase in the use of pipeline and tank-truck services in the Midwest, and this is particularly true in the area here concerned. In Wyoming and Colorado, crude-oil pipelines have been built from the producing fields, starting with the Elk Basin field in the northern portion, where the pipeline connects with other pipelines extending east, south, and west. The latter serve refineries in Wyoming, located at Lovell, Zube, Thermopolis, Casper, Glenrock, Sinclair, and Cheyenne, and at Denver, Colo. Product pipelines have been constructed from Casper to Cheyenne(Wyco) and to Denver (Dupont) Colo., and from Borger, Tex., to La Junta, Colo., and Denver. This has shortened greatly the hauls of gasoline and light oils, and the movement by tank-truck carriers has greatly increased.

In 1941, soon after World War II started, the demand for petroleum products for use in the war effort increased so that it beame necessary to use all tank cars in long-haul service, particularly in the movement from midcontinent fields to eastern seaboard territory. Enemy submarines had interfered with the movement of ocean tankers which normally plied from Gulf to Atlantic ports. This situation led to the issuance by the Director of the Office of Defense Transportation of a general order, O. D. T. No. 7, effective

May 4, 1942, which prohibited the use of tank cars for hauls of 100 miles or less. That order remained in effect until October 1942, when it was amended further by restricting the use of tank cars for hauls of 200 miles or less. Later, this order was amended by restoring the limitation to hauls of 100 miles. On August 15, 1945, all such restrictions were removed.

There is no pipeline into western Nebraska, and petroleum products from Colorado and Wyoming are moved into that area by either rail or motor carrier. In 1940, the gasoline originated in Colorado and Wyoming and terminated in western Nebraska moved 54.7 percent by rail and 45.3 percent by truck. In 1949, it moved 10.2 percent by rail and 89.8 percent by truck.

The consumption of gasoline in Colorado in 1950 was 278,086,443 gallons more than in 1935, an increase of 155.9 percent. During the same period, the volume of gasoline carried by the railroads declined from 86 percent to 7.5 percent of the total, and the volume carried by motor carriers increased from 14 percent of the total to 92.5 percent. Similar data are not available for Wyoming, but the consumption of gasoline in that State also increased by 155.5 percent during the same period.

The majority of the present rail rates were established in an effort to meet motor-carrier competition. They were generally patterned after a scale of rates prescribed in *Petroleum Products Between Kans., Okla., Ark., Mo., Colo.*, 245 I. C. C. 617. The general increases authorized in Ex Parte Nos. 162 and 166 have been added to these rates. At the time of the hearing herein, the competing motor carriers had not increased their rates to the same extent as have the respondents. In a further effort to meet motor-carrier competition the railroads removed the Ex Parte No.

168 increases in their rates on these commodities throughout western trunkline territory, and from Colorado and Wyoming and the Southwest to western trunkline territory. The tank-truck carriers state that they will meet any basis of rates published by the respondents from and to points covered by the schedules proposed.

The proposed rates [2] are generally on a basis of about 1.5 cents under the tank-truck rates. Departures from this basis occur in the disposition of fractions, in rates made to conform to the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, and in the observance of combination rates where lower than rates which would be obtained under the 1.5-cent formula. The 1.5-cent differential represents the respondents' best judgment as to the average difference in the cost of transportation for shippers who utilize rail transportation and those who use motor-carrier transportation. The respondents' present rates, and those proposed, are subject to Ex Parte No. 175 increases. At the time of the hearing, the Ex Parte No. 175 increase in this territory was 6 percent, but on May 2, 1952, this increase became 15 percent. At the oral argument it was stated that the motor carriers have likewise increased their rates on petroleum products to reflect the 15-percent increase authorized for the railroads in Ex Parte No. 175.

When rail transportation is used the shippers must furnish the tank cars which are usually obtained from tank-car owners on a monthly rental basis of not less than $50 a month, the monthly rate under the contract varying with the size and kind of car and the extent of its use. Although the respondents pay a mileage allowance of 2.2 cents per mile loaded and empty to the owner, the aggregate monthly

[2] Rates are stated in cents per 100 pounds and do not include Ex Parte No. 175 increases.

payments are not equal to the rental charge because the hauls, such as those here involved, are not long enough. The mileage allowance was increased from 2.2 to 3 cents on July 1, 1952, on specified types of tank cars.

On the other hand, no rental is charged against the shipper of petroleum products in tank trucks. The element of time also enters into the respondents' problem. The receivers of petroleum products utilizing motor-carrier transportation can obtain shipments from distribution points more expeditiously by the use of tank-trucks than they can when respondents' services are used. This permits the maintenance of lower inventories, which in turn reduces the expense of operation and requires smaller storage facilities.

The average load of a tank truck in the territory here considered is 5,600 gallons, and the average gallonage capacity of rail tank cars is 8,000 gallons or greater. Rail shippers must bear the cost of installing and maintaining private sidings to serve their plants. Eighty percent of the bulk storage plants in this area have rail facilities. For the entire country, a survey shows that 32 percent of the tank trucks of the intercity type are private trucks, and 68 percent are for-hire trucks. The latter have a much larger average capacity than the private trucks.

In some instances the proposed rates are the same as the present rates, with the exception of those on blended gasoline. The proposed rates would apply on this commodity while the present rates do not. The term "blended gasoline" has been added to the commodity descriptions in the tariffs because of the increased demand for ethyl gasoline, which is gasoline blended with a chemical compound known as "ethyl." In some instances gasoline is blended with color ingredients. The proposed rates do not specifically apply on diesel oil, as such, since there is no such tariff

description in the petroleum list. Diesel oil is usually billed as "distillate fuel oil," and when so billed the proposed rates would apply.

The respondents failed to publish reduced rates from Zube and Lovell to rail destinations south of those origins on the so-called Basin line of the Chicago, Burlington & Quincy Railroad Company, called the Burlington, in Wyoming, and the branch thereof which goes through Scottsbluff, Nebr. The respondents state that if the adjustment is approved, rates on a similar basis as here considered will be published from and to those points.

The present and the proposed relation between rail and motor-carrier rates is shown in the protestants' exhibits. These exhibits are somewhat inaccurate with respect to rates on Wyoming intrastate traffic from Cheyenne and Wyco to destinations on the Burlington and on lines of the Union Pacific Railroad Company, in that the exhibits show these rates as proposed and suspended, whereas in fact they were not suspended but became effective on October 1, 1950. The respondents, however, have agreed to treat such rates in the same manner as they may be permitted to treat the rates under voluntary postponement. The exhibits contain a statement of all the rail rates proposed to be reduced where there was any tank-truck movement within the period of a traffic study covering shipments from January 1950 to July 1951. The rates in each category number 511, the present and proposed rail rates, the present truck rates, and the rail short-line and highway distances are shown. The truck rates in this territory are published in cents per gallon, but have been converted to cents per 100 pounds on the basis of 6.6 pounds per gallon. These exhibits show that for all practical purposes the present rail rates are on a parity with the truck rates in 422 out of

511 instances. There are only 11 points where the present rail rates are lower than the present truck rates, and in 312 instances the present rail rate is the same as the present truck rate. There are 110 points where the present rail rates are 1 cent or less higher than the present truck rates. Effective on December 19, 1951, the motor carriers adjusted their rates to correspond with those presently published by the rail carriers. This eliminated most of the instances in which the truck rates were lower than the rail rates.

Using the protestants' exhibits based on a traffic study of all rates where there was any truck movement from January 1950 to July 1951, and comparing the proposed interstate rates with the minimum scales of rates, later detailed herein, which were prescribed by this Commission for application in other territories, it is shown that the proposed rates for mileage block 25-49 are as high as, or higher than, the area I and area III scales in Illinois, the northern lines' scale, or a scale in effect in the Southwest. For the mileage block 50-74, the proposed rates are higher than the area I scale. For the mileage block 75-99, the proposed rates are higher than the area I scale, with one exception. The exception is the proposed rate of 8.5 cents from Cheyenne to Mead, Colo., for a short-line rail distance of 77.3 miles. The area I scale rate for this distance is 9 cents. For the mileage block 100-149, the proposed rates are in most cases higher, and in only one instance 2 cents lower, than the area I scale. The proposed rate from Casper to Harrison, Nebr., is 12.5 cents for a short-line rail distance of 138.5 miles, and the area I scale rate for that distance is 14.5 cents. For the mileage block 150-199, in 14 out of 51 instances the proposed rates are below the area I scale. In the block 200-249, 36 out of 62 of the rates proposed are below the southwestern scale, the differences being usually 0.5 or 1 cent. In the block 250-299, 40 out of 66 of the

proposed rates are below that scale, the differences being usually 0.5 cent or 1.5 cents.

In *Petroleum Products in Illinois Territory*, 280 I. C. C. 681, the railroads in Illinois territory proposed rates averaging about 2 cents lower than the average of the truck rates, and about 1.5 cents lower than the average of the lowest of the truck rates. The Commission found reasonable 3 minimum scales for distances of 20 to 200 miles in areas designated I, II, and III. Area I includes all hauls from Chicago, Ill., and Illinois and Indiana origins taking the same rates, to destinations in Wisconsin. Area II covers all rates from Chicago and related origins to destinations in Illinois territory, other than Wisconsin. Area III covers the remainder of the adjustment in Illinois territory. Also, in that proceeding rates were proposed by the railroads in so-called northern lines' territory which averaged about 2.7 cents lower than the tank-truck rates. The Commission found reasonable a minimum scale for the northern lines' territory for distances of from 25 to 270 miles. The lowest of these minimum scales is the one authorized for area I. It begins with 5 cents for 20 to 30 miles and ends with 20 cents for 200 miles. The scale for area II begins with 6.5 cents for 20 miles and ends with 26 cents for 200 miles. The scale for area III begins with 6 cents for 20 to 30 miles and ends with 23 cents for 200 miles. The scale for northern lines' territory begins with 6 cents for 25 miles, is 23 cents for 200 miles, and ends with 31 cents for 270 miles.

The southwestern railroads, after extensive investigations, established, effective September 1, 1950, a scale of rates on gasoline and light oils, in tank-car loads, from points in Illinois, Missouri, Tennessee, Arkansas, Louisiana, Texas, New Mexico, Oklahoma, and Kansas to destinations in the Southwest, including certain destinations in

New Mexico, Missouri, and Kansas, for distances of 300 miles and less. Upon complaint of tank-truck carriers, division 3 found those rates less than minimum reasonable rates to the extent that they were below a prescribed minimum scale, graded upward from 6 cents for 20 miles to 23.5 cents at 200 miles and ending with 34 cents at 300 miles. *Southwestern Tank Truck Carriers Committee* v. *A. & S. Ry.*, 284 I. C. C. 75. This scale, referred to herein as the southwestern scale, is 0.5 cent to 2 cents higher than the minimum scale prescribed for the above-mentioned northern lines' territory. At 200 miles, it is only 0.5 cent higher than the northern lines' scale, and from 1 cent to 3.5 cents higher than the area I scale prescribed for Illinois territory.

In *Petroleum Products from Los Angeles to Ariz. and N. Mex.*, 280 I. C. C. 509, division 3 found that the rates proposed by certain railroads on petroleum products which were lower than the corresponding rates maintained by tank-truck common carriers by more than 2 cents from points in the Los Angeles, Calif., group to destinations in Arizona and intermediate points in southwestern New Mexico, were lower than necessary to meet the competition, that their establishment would result in an unwarranted sacrifice of revenue and constitute an unfair competitive practice, and thus were unreasonable. Rates on the approved basis became effective on June 25, 1951. The protestants show that following the establishment of such rates in July through October 1951, tank-truck traffic was 9 million gallons less than it was in the corresponding months of 1950, which amounted to a 20.1 percent reduction in gallons carried, and a 17.1 percent reduction in revenue.

The average rail rates, present and proposed, are compared by mileage blocks with the average scale rates prescribed in the Southwest, Illinois territory, and northern

lines' territory, and with the average rail revenues in western trunkline territory on class 501, gasoline, in the following table:

Mileage Block	Average rail rates		Average prescribed minimum scales			Average rail revenues, class 501
	Present	Proposed	Southwest	Illinois	Northern lines	
	Cents	Cents	Cents	Cents	Cents	Cents
1- 24	10.7	7.5	6.0	6.0	6.0	---
25- 49	9.1	7.8	7.5	7.3	7.0	---
50- 74	10.3	9.0	9.5	9.5	9.0	11.1
75- 99	12.0	10.5	12.0	11.9	11.4	13.9
100-149	15.4	13.7	16.7	15.7	14.4	16.9
150-199	20.1	18.4	20.7	20.9	19.8	23.0
200-249	28.1	25.7	25.6	---	26.8	27.3
250-299	32.7	30.6	31.5	---	31.9	34.4
300-349	37.6	35.3	---	---	---	42.0
350-399	42.7	40.6	---	---	---	44.2
400-449	47.0	44.4	---	---	---	50.5
450-499	50.0	47.5	---	---	---	52.5

Increased 15 percent, the proposed rates range from 8.6 cents for from 1 mile to 24 miles and 15.7 cents for 100 to 149 miles, to 29.5 cents from 200 to 249 miles and 54.6 cents from 450 to 499 miles.

Traffic studies indicate that the proposed reductions extend to origins and destinations which account for more than two-thirds of the traffic of the protestants. These studies also show that of the tank-truck traffic moving in the area covered by the proposed rates, 65 percent is interstate, 25 percent Colorado intrastate, and 10 percent Wyoming intrastate; that the average revenues of the tank-truck carriers from Colorado intrastate traffic are considerably lower than on interstate traffic; and that the average revenues of tank-truck carriers from Wyoming intrastate traffic are higher than on interstate traffic.

The rail movement of petroleum products, commodity classes 501, 503, and 507, in western trunkline territory is compared with the movement of those commodities by nine

tank-truck carriers in this territory. This comparison indicates that 45.7 percent of the rail revenue from this traffic was from hauls in excess of 350 miles, as compared with only 5 percent over the routes of the 9 tank-truck carriers. For hauls under 200 miles, the railroads received 28.7 percent of their revenue from these petroleum products, as compared with 57 percent for the 9 tank-truck carriers.

The protestant tank-truck carriers made a study of the traffic based upon a 5-percent waybill sample for the period January 1 through October 31, 1950. A supplemental study covered the period November 1, 1950, through June 30, 1951. These studies indicate that 85 percent of the petroleum traffic moved to bulk plants and only 1.55 percent to filing stations; about 50 percent originated at refineries and 50 percent at pipeline terminals. The movement from pipeline terminals to bulk plants was much shorter than from refineries to bulk plants, the average being 87 miles as compared with 201 miles from refineries.

The protestants presented a study of tank-truck costs covering all operating expenses, rents, and taxes (other than Federal income taxes), exclusive of return on investment. The study covers the operations of six large tank-truck carriers, and is based upon actual-time studies of all runs made by each carrier during a representative test week. The expense figures used to develop the truck costs were those for the four quarters ended June 30, 1951. The expenses were divided as between (1) running and (2) loading and unloading. The average system costs obtained embrace all the operations of the tank-truck carriers, including their operations outside the territory covered by the proposed rates, and include the transportation of commodities other than those on which the proposed rates apply. They embrace operations in the mountainous sections of Colorado, and include the transportation of heavy oils.

The average unit cost for the 6 tank-truck carriers included in the study was 48.92746 cents per loaded mile, and 2.03323 cents per 100 pounds for loading and unloading. From these average system costs the protestants constructed a mileage scale of truck costs. For 25 miles, the average truck cost was computed to be 5.25 cents per 100 pounds; for 50 miles, 8.48 cents; for 75 miles, 11.7 cents; for 100 miles, 14.93 cents; for 150 miles, 21.38 cents; for 200 miles, 27.83 cents; for 250 miles, 34.28 cents, and for 300 miles, 40.73 cents. These truck costs for distances over about 75 miles are higher than the present rail and truck rates.

The average truck revenue from the present rates, the operating costs, and the operating ratios were computed separately for interstate and intrastate traffic by mileage blocks. For distances above 75 miles on interstate and Colorado intrastate traffic the operating costs exceed the revenues, and the operating ratios are above 100. On the affected commodities in other areas, and on other commodities in the territory here considered, the operating ratios are 82 and 89 percent, respectively. The operating ratio on all traffic of these carriers is shown as 98.

Much of the truck operations in Wyoming are in mountainous territory. This is also true as to truck operations interstate from Wyoming to a portion of western South Dakota. On the other hand, most of the Colorado intrastate movement and most of the interstate movement to and from Colorado, Kansas, and Nebraska is in plains territory. The result of using system average operating costs is to understate the cost in Wyoming and overstate the interstate and the Colorado cost, with similar understatement and overstatement of operating ratios.

A number of tank-truck operators testified that they could not compete with the railroads if the tank-truck rates were any amount higher than the rail rates, and that they would be compelled to meet the reduced rates or go out of the business.

This proceeding is part of a general effort by the railroads to regain some of the refined petroleum traffic. It is impossible generally for the railroads to compete with the pipe lines, but there are reasonable grounds for the belief that they may continue to compete profitably with the tank-truck carriers within certain limitations. The record clearly shows that under an equal basis of rates in this territory the tank trucks have gradually taken over the movements, in Colorado, for example, up to 92.5 percent of the total traffic. In other territories where reduced rail rates have been filed to meet tank-truck competition, the Commission has found as a fact that the railroads cannot compete successfully with the tank-truck carriers at equal rates. The record is convincing that in the territory here considered the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory, except for the shorter hauls.

The evidence before us, including the costs of the tank-truck carriers as shown by the protestants, is convincing that for hauls below about 75 miles the tank-truck costs are lower than those of the rail carriers, and that for the longer hauls the reverse is true. It thus appears that for the shorter hauls the motor carriers have an inherent advantage in cost over the rail carriers, and that the reverse is true for the longer hauls. There is no evidence before us that the respondents could operate under the proposed rates for the shorter hauls without casting a burden upon

other traffic. In these circumstances, approval of the proposed rates for the shorter hauls would run counter to the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation so as "to recognize and preserve the inherent advantages of each."

We are of the opinion that the respondents' rates on this traffic for short-line distances under 75 miles should be no lower than the corresponding rates of the tank-truck carriers, and that for the longer hauls their rates should in no instance be lower than 1.5 cents under the prevailing tank-truck rates from and to the same points.

We find that the proposed rates are not shown to be just and reasonable. An order will be entered requiring the cancellation of the proposed schedules and discontinuing the proceeding, without prejudice to the establishment of rates in conformity with the views expressed herein.

ALLDREDGE, *Chairman*, dissenting in part:

I agree with the majority that the proposed rates have not been shown to be just and reasonable, and that respondents' rates on this traffic for short-line distances under 75 miles should be no lower than the corresponding rates of the tank-truck carriers. But I am not in accord with the conclusion that must be drawn from the opinion expressed in the penultimate paragraph of the report that respondents' rates for such short-line distances should be 1.5 cents per 100 pounds lower than the corresponding tank-truck rates.

Despite the specific provision of section 15 (7) of the Interstate Commerce Act that, at any hearing involving a rate change proposed by a carrier subject to part I of the

act, the burden of proof that such change is just and reasonable shall be upon the proponent carrier, the respondents in this proceeding did not offer any evidence whatever with respect to the cost incurred by them in the handling of this traffic. The Commission, therefore, is unable to determine on the evidence of record whether any of the rates proposed by respondents bear a proper relation to their costs or exceed reasonable minima from a cost-of-service standpoint.

If we should draw on our experience and take cognizance of precedents in passing judgment on these rates, however, I think we might reasonably conclude that the motor carriers have the advantage of the rail carriers in the costs of transporting this traffic for distances up to approximately 200 miles. This is where I would, in fact, draw the line in differentiating between motor and rail rates instead of at 75 miles, as is done in the report of the majority. This would, I think, comport with the demands of the national transportation policy that the inherent advantages of each mode of transportation be recognized and preserved.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 30th day of June, A. D. 1953.

INVESTIGATION AND SUSPENSION DOCKET NO. 5853

PETROLEUM, COLORADO AND WYOMING TO W. T. L. TERRITORY

It appearing, That by order dated September 29, 1950, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said

order, and suspended the operation of said schedules until April 30, 1951, and that the respondents have voluntarily postponed the effective date of the schedules pending the disposition of this proceeding;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and has found that the said schedules are not shown to be just and reasonable;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the proposed schedules, on or before August 7, 1953, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be discontinued.

By the Commission, division 2.

GEORGE W. LAIRD,
Acting Secretary.

(SEAL)

APPENDIX C

APPLICABLE STATUTES

National Transportation Policy

(U. S. Code, title 49, notes preceding secs. 1, 301, 901, and 1001.)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Interstate Commerce Act

Section 1, paragraph (4) and (5) (a)
(49 U.S.C. sec. 1, (4) and (5)(a))

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable

through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15(7)

(49 U.S.C. sec. 15(7))

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such

rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Office - Supreme Court, U. S.
FILED
MAR 18 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954

No. 566

WARD TRANSPORT, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the District of Colorado

Brief of Appellants in opposition to Motions to Affirm

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Brief of Appellants in opposition to Motions to Affirm

Pursuant to Rule 16, paragraph 3, of the Revised Rules of this Court, appellants present this brief in opposition to appellees' motions to affirm the judgment of the district court.[1]

[1] The United States and the Interstate Commerce Commission joined in one motion to affirm. A separate motion was filed by the railroad appellees.

Most of what is appropriate for reply to appellees' motion to affirm is said on pages 9 to 15 of appellants' Jurisdictional Statement and will not be repeated. This brief is presented to distinguish certain cases relied upon by appellees and to bring to the attention of this Court a recent unreported opinion of the United States District Court for the District of Oregon (three judges sitting), reproduced in Appendix A hereto,[2] which set aside an order of the Interstate Commerce Commission similar to that here involved upon grounds like the principal grounds relied upon by appellants in the instant case.

1. The first question presented by this appeal involves the substantiality of the evidence as to railroad costs relied upon to support the Commission's findings 1) that the proposed rates would not be compensatory for distances under 75 miles and would be compensatory for longer distances, and 2) that railroad costs are higher than motor-carrier costs for distances under 75 miles and lower than motor-carrier costs for longer distances. Appellees suggest the question raised in the instant case is similar to that raised in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, in which this Court held that the representativeness of a cost study is a question of fact which is within the competence of the Commission to decide, and not for this Court. The alleged error in the instant case is of a different kind. It does not involve a cost study of any kind. Rather, it involves treating unsifted average system operating expenses per ton-mile and per car-mile on all traffic moving for all distances in all kinds of equipment throughout the area from Chicago to the Pacific Ocean as the sole basis for determining the railroad costs of transporting petroleum products in a limited area (Wyoming, Colorado, western South Dakota, western Kansas and western Nebraska), in special, privately owned,

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[2] That opinion was handed down on March 3, 1955, after appellants filed their Jurisdictional Statement.

equipment (tank cars) on which the railroads pay a mileage allowance of 3 cents per mile, loaded and empty, and as to which a 100 percent empty haul is experienced. In *Northern Pacific Railway Co.* v. *Department of Public Works*, 268 U.S. 39, this Court, speaking through Mr. Justice Brandeis, said that the use of such averages in computing the operating costs incurred in transporting a single commodity within a limited territory "vitiated the whole process of reasoning by which the Department reached its conclusion." Contrary to the suggestion in the motion of the United States and the Commission (pp. 4-5), the administrative order involved in the case last cited was not set aside because this Court thought the Commission erred in failing to give weight to certain other railroad evidence as to costs. The error found in the case cited was in the evidence relied upon—such evidence being of the same character as was relied upon in the instant —, not in the failure of the Commission to give weight to other evidence.

The railroad appellees suggest that the finding of the Commission as to the relation of motor-carrier costs to railroad costs in transporting petroleum rested on an equation which, on the railroad's side, showed that the average system-wide costs of the railroads per ton-mile and per car-mile in transporting all traffic was only about half of the earnings produced by the proposed rates, and, on the motor-carrier's side, showed that the earnings under present motor-carrier rates beyond 75 miles were less than the average system costs of the motor carriers. However, there is no suggestion in the report of the Commission, much less a finding, that it followed the method claimed in arriving at its conclusion. If it had followed that method and had entered appropriate findings, there would still remain a lack of substantial support in the

evidence. The defect on the railroad's side of the equation is precisely the same as that found by this Court in the *Northern Pacific Railway Co.* case, *supra.* The defect on the motor carrier's side of the supposed equation is that the Commission itself found that the system average operating costs for motor carriers overstated the costs for *interstate* hauls, which are the only hauls involved in the Commission case (Juris. Statement 41). Since there is no finding in the report as to the amount of the overstatement, there is no basis for the contention that the Commission viewed the interstate rates via motor carrier as exceeding the motor-carrier costs chargeable to the interstate traffic.

The holding of the lower court in the instant case on the point under consideration is contrary to the holding on the same point in an opinion handed down on March 3, 1955, by the United States District Court for the District of Oregon (three judges sitting), in *Pacific Inland Tariff Bureau, et al.* v. *United States, et al.* That case involved an order of the Commission approving certain reduced railroad rates on petroleum products in the States of Idaho, Montana, Oregon, Washington and Wyoming issued in *I. & S. Docket No. 6062, Petroleum in North Pacific Coast Territory,* 291 I.C.C. 101 (Division 2, November 25, 1953), 292 I.C.C. 317 (Entire Commission, April 19, 1954). In that case the railroads undertook to prove that the proposed rates were compensatory by comparison with average system operating expenses on all traffic, just as in the instant case. The Commission in that case, as here, accepted that evidence as sufficient to the purpose. The district court (three judges sitting) struck down that order of the Commission in an opinion handed down on March 3, 1955 (unreported), which is reproduced in Appendix A hereto. One principal ground for setting that order aside was that the Commission rested its findings on compari-

sons with system average expenses of railroads on all traffic (page 27, *post*).

2. The second principal question involves the failure of the Commission to make findings upon the evidence as to the factors embraced by the National Transportation Policy. The United States and Interstate Commerce Commission contend that the report of the Commission in the instant case showed that it considered the National Transportation Policy so that it is unlike the report of the Commission reviewed and set aside in *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72 (S. D., Calif.), (Motion of United States and Interstate Commerce Commission 6). The railroad appellees take the view that it was not necessary for the Commission to make specific findings as to every aspect of the National Transportation Policy which may be involved in the case (Motion of railroad appellees 7).

Appellants respectfully submit that there is the same lack of findings in the instant case as there was in the *Cantlay & Tanzola, Inc.* case as to the effect of the proposed rates on the adequacy of transportation services by motor carriers. It is not sufficient for the Commission to have concern only for railroad service when administering the Interstate Commerce Act in the light of the National Transportation Policy; motor-carrier service must also be considered and findings entered to show such consideration.

In its first report in the proceedings under review in the *Pacific Inland Tariff Bureau* case the Commission made no mention of the National Transportation Policy. In its report on consideration in that case,[3] the Commission

[3] The report upon reconsideration was issued after the plaintiffs had secured a temporary restraining order against the enforcement of the first order of the Commission because of the failure of the Commission in that report to consider and apply the National Transportation Policy.

did take note of the National Transportation Policy but concerned itself only with the interests of railroads and with the possibility of their elimination as carriers of petroleum products in the area there involved. In the *Pacific Inland Tariff Bureau* case, as here, there was a substantial volume of evidence as to the need for adequate motor-carrier service in the territory involved and as to the disastrous effect upon those services if the proposed rates became effective. In neither that case nor this did the Commission make specific findings one way or the other as to that evidence. In the case cited the failure of the Commission to make such findings was given as another reason for striking down the order. (Pages 25-26 and 28-38, *post*) A similar omission in the instant case should be looked upon as warranting like action.

3. The remaining questions involve (i) the unsubstantiality of the evidence to support the Commission's finding as to the competitive necessity for the proposed rates and (ii) the action of the Commission in approving a rate differential in favor of railroads in the limited territory involved because it had approved a differential relation in other territories in other cases. As to the substantiality of these questions, appellants rest on what is said in their Jurisdictional Statement.

Appellants respectfully submit that the questions raised by this appeal are substantial, that probable jurisdiction should be noted, and that the motions to affirm should be denied.

Respectfully submitted,

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APPENDIX A

United States District Court

FOR THE DISTRICT OF OREGON

PACIFIC INLAND TARIFF BUREAU, et al., Plaintiffs, vs. **UNITED STATES OF AMERICA,** et al., Defendants, and **INTERSTATE COMMERCE COMMISSION,** Intervening Defendant.	**Civil No. 7278**

Before POPE, Circuit Judge, and McCOLLOCH and SOLOMON, District Judges.

SOLOMON, District Judge.

This action was brought to enjoin orders of the Interstate Commerce Commission entered November 25, 1953, in the proceeding entitled "Suspension Docket No. 6062, Petroleum in North Pacific Coast Territory" and in three related matters heard jointly therewith.[1] By a supple-

[1] Fourth Section Application No. 27614, Petroleum in North Pacific Coast Territory; No. 31110, Katherine M. Lee and Tim Babcock, doing business as *Babcock and Lee, et al.* v. *Chicago, Burlington & Quincy Railroad Company, et al.*; and No. 31156, *System Tank Lines, Inc., et al.* v. *Great Northern Railway Company.*

mental complaint, orders of the Commission dated April 19, 1954, were included.

Plaintiffs are a group of motor common carriers of bulk petroleum products, barge operators, and the Teamsters Union. Defendants are several railroads and the Interstate Commerce Commission. The United States of America, because of statutory necessity (28 USCA Sec. 2322), was also made a party.

Defendant railroads, by schedules to become effective on January 10, 1953, proposed substantial rate reductions on interstate shipments of petroleum and petroleum products in tank carloads from and to points in Oregon, Washington, Idaho, Montana, and Wyoming. Most of the plaintiffs protested these rates. On January 9, 1953, the Commission ordered that an investigation of the lawfulness of the proposed rates be instituted and suspended their operation until August 9, 1953, the entire seven months period permitted by statute, 49 USCA Sec. 15 (7). At the request of the Commission, the railroads voluntarily extended the suspension period until December 9, 1953.

At approximately the same time, several of the railroads sought authorization to establish and maintain rates on the transportation of petroleum products from points in Oregon, Washington, Idaho, and Canada, to Helena and Butte, Montana, without observing the long and short haul provisions of Section 4 of the Act. These two proceedings were consolidated for hearing with Complaint Docket Nos. 31110 and 31156, in which complainants protested the reduced railroad rates on transportation of certain petroleum products from points in Wyoming and Montana to points in Northern Idaho and Eastern Washington, and from the specified points in Montana to Spokane, Washington. These rates were protested but not suspended.

From March 30, 1953, to April 18, 1953, hearings on these four proceedings were held before an Examiner of the Commission at Portland, Oregon. The Commission's hearings were held cooperatively with the Public Utilities Commission of Oregon and the Washington Public Service Commission which were investigating proposed rate reductions on the intrastate movement of petroleum and petroleum products. It was agreed that any evidence adduced at the hearings could be used in each proceeding without restriction.

All parties waived a report by the Examiner. Oral argument was held before Division 2 of the Commission and, on June 9, 1953, the case was submitted to the Commission on the record, briefs, and oral arguments.

On November 25, 1953, Division 2 issued its report and orders which found that the suspended rates were just and reasonable.[2] Although these reduced rates would go into effect at 12:01 a.m., December 9, the Commission did not release the report and orders until December 4. Copies were sent to protestants by regular mail and arrived in Portland on December 8. However, on December 4, plaintiffs learned of the report and order and secured a copy. This copy, sent airmail, reached plaintiff's attorneys on Saturday, December 5.

On December 6, plaintiffs, in a telegram to the Commission, requested a reconsideration by the full Commission of the orders of Division 2 and a stay pending reconsideration. Plaintiffs amplified this telegram by a second telegram on December 7. The telegrams requested immediate answers by wire collect.

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[2] In the two complaint cases, Division 2 found that the rates were not shown to be unreasonable or otherwise unlawful and in the Section 4 Application exempted the carriers from the long and short haul provisions because it found the proposed rates, with certain exceptions, to be reasonably compensatory and justified.

On the morning of December 8, plaintiffs, having failed to receive an answer from the Commission, filed a complaint and presented to the court a motion for a restraining order prohibiting the railroads and the Commission from putting the orders of Division 2 into effect.

During the arguments by attorneys for both plaintiffs and defendant railroads, plaintiffs received a telegram from one Commissioner explaining that the Commission could not further suspend the rates and that it was too late for the railroads to suspend the rates voluntarily. At 4 p.m., on December 8, the court issued a temporary restraining order enjoining the railroad defendants and the Commission from putting into effect the rates suspended in 6062.

On December 16, plaintiffs filed a formal petition for reconsideration by the full Commission.

The railroads moved to dissolve the temporary restraining order and also opposed the granting of a temporary injunction on the ground that, since plaintiffs' petition for reconsideration had not been acted upon by the Commission, plaintiffs had not exhausted their administrative remedies. The motion to dissolve was denied and, on December 18, after a hearing, the court issued a temporary injunction.

Thereafter, the Commission re-opened the proceedings and, on April 19, 1954, issued its own report and findings. The full Commission adopted, with a few minor exceptions, the report of Division 2. It also made additional findings relative to the National Transportation Policy. On the same day, the Commission entered its order affirming the action of Division 2 and dismissing the complaint proceedings.

Plaintiffs then filed a supplemental complaint in which

they attacked the full Commission's report on the same grounds set forth in the original complaint. All defendants answered the original and supplemental complaints on the merits. In addition, defendant railroads, in their answers, continued to contest the court's jurisdiction.

Although the supplemental complaint was filed after the Commission had reconsidered and affirmed the orders of Division 2, all parties agree the jurisdiction of the court is to be determined by the facts as they existed at the time the original complaint was filed.[3]

JURISDICTION

The railroads first contend that plaintiffs have no standing in court other than on behalf of or as members of the general public because the Commission's order affects only railroad rates.

Section 15 (7) of the Interstate Commerce Act imposes upon the Commission the duty of investigating and determining the lawfulness of proposed rates. The National Transportation Policy, Act of Sept. 18, 1940, c. 722, Title I, Sec. 1, 54 Stat. 899,[4] is the policy which the Commission

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[3] Notwithstanding this concession on the part of plaintiffs, if Rule 15(d) of the Federal Rules of Civil Procedure is to be given the broad and liberal construction suggested by Rule 1, the filing of a supplemental complaint should avoid a dismissal even though the original complaint failed to set forth facts showing an administrative determination which was then ripe for review. See concurring opinion of Judge Clark in *Technical-Tape Corp.* v. *Minnesota Mining & Mfg. Co.*, 200 F. 2d 876, at 879.

[4] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote, safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among

must apply in determining the lawfulness of such rates. This policy includes consideration of the needs of competing forms of transportation. *Eastern-Motor Carriers Association* v. *United States*, 321 U.S. 194, 206 (1944). Rates which are "unfair" or which reflect "destructive competitive practices" are unlawful.

The public has an interest in the maintenance of "reasonable charges" and of a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899. Congress recognized this public interest by giving "any body politic or municipal organization" the right to challenge proposed rates. 49 USCA Sec. 13 (1).

Congress also recognized that competing carriers whose existence depends upon the maintenance of a lawful rate structure have an interest in the enforcement of the Act. Any common carrier has the right to file a complaint concerning the lawfulness of any rate proposed by another common carrier and to require the Commission to take action in accordance with Section 15(7) of the Act. The right of a competitor to participate not only in such administrative proceedings but also in the courts has long been recognized. Carriers have an independent right under the Act to appeal a decision involving a competitor which

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the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

they claim adversely affects them. *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14 (1933). *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

Except in unusual circumstances, if one form of carriage is cheaper, shippers will employ it exclusively. This was recognized in the Washington Public Service Commission's opinion on the intrastate aspects of this case, which stated:

> "Even a slight differential in rail rates below the common carrier truck rates will prevent the common carrier from securing the traffic."[5]

Federal Courts have consistently exercised jurisdiction in cases in which public utilities have asserted that a regulatory body has imposed confiscatory rates. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290 (1923); *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196 (1924).

By permitting the railroads to reduce their rates, the Commission has, in effect, required the motor carriers to reduce their rates. To deny the motor carriers the opportunity to have such rates judicially reviewed is indistinguishable in practice from a denial of an opportunity to challenge rates directly imposed upon them.

The railroads next contend that the United States is an indispensable party, 28 USCA Sec. 2322; that this court has jurisdiction only if the statutory procedure is followed and that 49 USCA 17 (9) authorizes a suit to enjoin or set aside an order of the Commission only after an application for rehearing, reargument, or reconsideration of an order of an appellate division or of the whole Commission has been disposed of "but not otherwise." The railroads conclude that since this action was instituted prior

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[5] *Pacific Inland Tariff Bureau, Inc.* v. *North Pacific Coast Freight Bureau*, dated December 18, 1953 T-8917.

to the time the petition for reconsideration had been disposed of, plaintiffs' claims of irreparable injury are irrelevant and this court has no jurisdiction to enjoin or set aside the orders of the Commission.

Ordinarily one must await the conclusion of all available administrative proceedings before seeking judicial intervention. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50 (1938). However, administrative " 'finality' is not * * * a principle inflexibly applied." Concurring opinion, Mr. Justice Frankfurter in *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 156 (1951).

Judicial intervention is permitted where the issue is solely one of law, *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919), or where there is a showing of immediate and irreparable injury flowing from an inadequacy of the prescribed administrative procedure. *Oklahoma Natural Gas Co.* v. *Russell, supra*

In these proceedings, the Commission claimed that its authority to suspend the proposed rates pending review by the whole Commission had been exhausted The record of the proceedings before the Commission, considered independently from plaintiffs' affidavits, demonstrates that if the suspended rates are permitted to go into effect, plaintiffs could not be compensated for losses sustained and many might be forced out of business or into bankruptcy.

In *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953), the railroads raised the same jurisdictional objections which the court overruled, holding:

> "As to the ground first stated the danger of immediate and irreparable injury to plaintiffs, had they awaited action of the Commission on their petition for reconsideration, was sufficiently clear to warrant judicial intervention in advance of final administrative action by way of exception to 'the long-settled rule of judicial administration (see *Eccles* v. *Peoples Bank*,

> 1948, 333 U.S. 426, 434, 68 S. Ct., 641, 92 L. Ed. 784) that no one is entitled to judicial relief for a * * * threatened injury until the prescribed administrative remedy has been exhausted.' " (page 76)

We agree.

The railroads' third jurisdictional contention is that the provisions of 49 USCA Sec. 17 (9) establishes the right and prescribes the methods for judicial review of Commission orders, and is not superseded by the Administrative Procedure Act (5 USCA Secs. 1001-11).

The Administrative Procedure Act was intended to apply to the Interstate Commerce Commission. Page 5 of the Senate Report (Senate Report 752, 79th Cong. 1st Sess.) declares that:

> " * * * Manifestly it would be folly to distinguish between 'good' agencies and others, and no such distinction is made in the bill. The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill."

The courts have construed the Act to apply to proceedings before the Interstate Commerce Commission. *Chicago & E.I. R. Co.* v. *United States* (S.D. Ind., 1952), 107 F. Supp. 118, aff'd. 344 U.S. 917; *Atlanta & Saint Andrews Bay Ry. Co.* v. *United States,* (M.D. Ala. 1952) 104 F. Supp. 193, *Cantlay & Tanzola* v. *United States, supra.*

Plaintiffs are persons "adversely affected or aggrieved" by agency action within the meaning of 5 USCA Sec. 1009 (a) and the order of Division 2 is final and permits judicial review unless the procedure set forth in 49 USCA Sec. 17 (9) is included in the phrase "except as otherwise expressly required by statute" appearing in 5 USCA Sec. 1009 (c).

The following excerpts from the House Report (House Report 1980, 79 Cong. 2nd Sess.) are illustrative of the

intent of Congress on the reach of the Administrative Procedure Act.

> "The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all the agencies have been exempted in general terms." (page 16)
>
> "The Bill is so drafted that its several sections and subordinate provisions are closely knit." (page 17)
>
> "There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective." (page 43)

To deprive plaintiffs of the opportunity to have the action of the Commission judicially reviewed and to obtain the protection of the court in maintaining the status quo pending such review, would give an order of the Interstate Commerce Commission a preferred position which we do not believe Congress intended.

MERITS

Having found that this court had jurisdiction at the time the original petition was filed, we now consider the case on its merits.

The rate reductions proposed by the railroads pertain to the carload carriage of gasoline and light oils between Washington, Oregon, Idaho, and parts of Montana and Wyoming.[6]

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[6] This is the most recent of many cases which reflect the growing competition for the carriage of petroleum products in the Pacific Northwest. Past proceedings include: *Petroleum between Washington and Oregon Points*, 225 I.C.C. 382 (1937); *Petroleum between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609 (1939). Aff'd. as *Scandrett* v. *United States*, 32 F. Supp. 995 (D. Ore. 1940). Aff'd. 312 U.S. 661; *Petroleum Products from Salt Lake City to Spokane*, 273 I.C.C. 736 (1949); *Inland Nav. Co.* v. *Big Creek and T.R. Co.*, 281 I.C.C. 515 (1951); *Petroleum between Portland and Spokane, P. & S. Ry. Points*, 286 I.C.C. 516 (1952).

Generally the proposed reductions fall into three geographical classifications:

(1) shipments from Puget Sound points and Portland, Oregon, to Spokane, Washington, and the surrounding area in the Upper Columbia River Basin, which is sometimes referred to as the Inland Empire;

(2) shipments originating and terminating within the Inland Empire:

(3) shipments from refineries and producing fields in Montana and Wyoming westward to the Inland Empire.[7]

From	To	Present Rate ¢ per 100 lbs.*	Proposed Rate ¢ per 100 lbs.*
Portland, Ore.	Spokane, Wn.	41	35
Portland, Ore.	Pasco, Wn.	27	20.5
Pasco, Wn.	Spokane, Wn.	24	20
Portland, Ore.	Moscow, Id.	50	37
Portland, Ore.	Lewiston, Id.	43	35
Seattle, Wn.	Spokane, Wn.	41	35
Seattle, Wn.	Moscow, Id.	50	37
Seattle, Wn.	Lewiston, Id.	43	35
Spokane, Wn.	Moscow, Id.	16	15
Spokane, Wn.	Bonners Ferry, Id.	19	17
Spokane, Wn.	Port Hill, Id.	32	20
Spokane, Wn.	Perma, Mont.	43	28

* The proposed rates include ex parte increases while the present rates generally do not include these permissive increases.

The railroads also propose lowering the weight classification of certain distillate fuel oils from 7.75 pounds per gallon to 6.6 pounds per gallon.

Although the reduced rates on westbound traffic from Montana and Wyoming published by the railroads were protested by a few motor carriers, these rates were not suspended. This truck traffic of petroleum appears to be insignificant, and no serious effort was made to prosecute

[7] Representative examples of the proposed reductions are:

the complaints before the Commission. Plaintiffs in these proceedings have directed their attention to I & S 6062. In this Opinion, we shall do the same.

MAJORITY REPORT OF THE COMMISSION

The majority report substantially repeated the findings and conclusions of Division 2, and also made certain additional findings relating to the national transportation policy. A summary of the majority report follows.

The railroads proposed rate reductions in an effort to secure petroleum traffic presently carried by unregulated proprietary tank trucks operated by oil companies, farm cooperatives and distributors. The railroads also sought to meet competition from other common carriers, particularly a petroleum pipe-line between Salt Lake City, Utah, and Pasco, Washington,[8] motor carriers and Columbia River barges.

In recent years, railroad carriage of petroleum products consumed in the Inland Empire has been steadily diminishing and now constitutes a small portion of the total consumption. Beginning in 1935, Columbia River barges have grown from an insignificant carrier to the dominent upstream carrier of petroleum.

The other important source of revenue for barges comes from the downstream carriage of wheat. In 1952, approximately 1/13th of the total wheat production in counties adjacent to the Columbia River was carried downstream by barges. Farm cooperatives in these counties are inter-

[8] Since the hearing, this pipe-line has been extended to Spokane, Washington. In view of the undisputed evidence that no form of carrier can compete with a pipe-line, we question the present pertinence of much of the argument and evidence before the Commission.

ested in continuing barge service because of its economy and transportation characteristics.

All shippers except Standard Oil Company of California[9] depend upon upstream petroleum tank farms maintained by several barge operators on the Columbia River. However, oil companies and distributors own storage facilities at numerous interior points not serviced by railroads.

The Salt Lake City-Pasco pipeline is a common carrier owned by a subsidiary of Standard. When this pipeline was completed, Standard was dissatisfied with the rate structure of motor common carriers. It therefore acquired a fleet of trucks to haul petroleum from the pipeline terminus to its bulk storage facilities. However, Standard has given no indication of its plans if the proposed rates become effective.

The average cost to Standard of ocean shipment of petroleum from California to Pasco, including terminal expenses, is 24.7¢.[10] Standard's cost of shipping from Pasco to Spokane by proprietary trucks is 19.5¢.

Some of the oil companies operate their trucks on a 24-hour basis six days a week. These long hours permit low cost per gallon transportation. Neither the common carriers by rail or by truck, under their present rate levels, can compete with distributors who transport petroleum products owned by them over the highways in their own tank trucks.

In addition to proprietary trucks which deliver petroleum to bulk storage points, many of the oil companies use their own trucks to transport petroleum from bulk storage points to retail outlets. This is known as "clipper service."

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[9] Hereinafter referred to as "Standard."

[10] All shipping costs are for 100 pounds unless otherwise specified.

It is unlikely that any common carrier rate reduction would induce oil companies to discontinue their clipper service.

The barge rate from Portland to Pasco is 13¢. In addition, there is an optional charge for insurance and accountability (an allowance for evaporation), but all major oil companies bear these risks themselves. All except Standard pay 2½¢ for handling at public facilities. The total barge factor for transporting petroleum from Portland to Pasco is 15.7¢.

Petroleum originating in Salt Lake City is moved to Pasco by pipeline at a cost of 65¢ per barrel or 23.5¢ per hundred pounds. The truck or railroad charges for petroleum transported from Pasco to Spokane are the same whether the petroleum reached Pasco by barge or pipeline. The expected cost by the new pipeline from Pasco to Spokane will be only 9¢, which is 11¢ lower that the proposed railroad rate.

In proposing these new rates, the railroads relied in part upon an investigation made to determine the rate level necessary to capture traffic handled by proprietary trucks and also to enable Montana and Wyoming producers to ship distress residual products to the Inland Empire. The proposed scale is somewhat higher than the 270 mile scale approved in *Petroleum Products in Illinois Territory*, 280 I.C.C. 681-695 (1951).[11]

Railroad carriage of petroleum does not require unusual expenditure or preparation on comparison with many other commodities. However, the record was inadequate to warrant a finding as to the relationship between the cost of servicing petroleum and other commodities.

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[11] There is no finding showing the relationship between the rates approved in the Illinois Territory and the general rate structure there. Neither was there a comparison between the rate structure in the Illinois and North Pacific Territory. A rate considered in a vacuum has little value.

Barge operators testified to the economic necessity of maintaining two-way traffic, but gave no specific evidence on this issue. Nor did they offer evidence of net revenue and operating expenses. Their evidence was insufficient to provide a basis for determining rate levels needed to permit profitable operation.

The motor carriers gave little evidence of petroleum volume between specific points. Motor carriers do not compete with the pipeline and barge carriers, but supplement those services by carrying from their termini. Records of thirteen motor carriers showed that if they had met the proposed rates in 1952, their revenues would have totaled $7,878,707 instead of $8,364,979. The following language sets forth the views of the majority on the manner of compensating for any revenue deficiency:

> "There is, however, no convincing evidence that the rate reductions proposed by the respondents would necessitate or occasion the establishment of lower rates by motor carriers to the large number of bulk distributing facilities now served by them and situated in areas not traversed by a railroad line, nor to bulk facilities in towns and cities traversed by one or more railroads which are so far from rail tracks as to require the unloading of petroleum products from railroad tank cars into containers adjacent to railroad tracks and later the reloading of those products into motor vehicles for transportation to ultimate distributing points."

If the downward trend in railroad traffic were to continue, "it appears certain that the railroads would be entirely eliminated as carriers of these products to destinations in the states of Washington, Idaho, and Oregon, contrary to the national transportation policy and the national defense, reference to which is made by the protestants."

The basic finding concerning adequacy of railroad revenue to be produced under the proposed rates was that:

> "The proposed rates would produce net operating revenue per gross-ton mile ranging from 18 to 853% more than the corresponding revenue received by them from all commodities."

Even though system average figures are open to criticism, *Northern Pacific Ry Co.* v. *Dept. of Public Works of the State of Washington*, 268 U.S. 39, (1925) "'* * * exactness is not necessary, especially in view of the wide margin of error between the expense figures and the revenue figures.'" The satisfactory financial position of the railroads supported their contention that the proposed rates would not cast a burden on other traffic. The proposed rates are reasonably compensatory, no lower than necessary to meet competition and "would not contravene any of the provisions of the national transportation policy."

The majority concluded:

> "* * * We further find, in Investigation and Suspension Docket No. 6062, that the proposed rates are reasonably compensatory and in harmony with the national transportation policy of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[12]

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[12] The report of Division 2 merely noted protestants' allegations of violations of the national transportation policy, but made no findings. Plaintiffs originally sought relief from the report and order of Division 2.

MINORITY REPORT

Commissioner Knudsen dissented.[13]

He characterized the findings relating to the national transportation policy as:

> "• • • Unsupported • • • for nowhere in the balance of the report do I discover ancillary findings of fact from the record that would support this conclusion. The railroad respondents in this proceeding transport many hundreds of different commodities. The barge lines and the motor carriers who are protestants, survive, if at all, on their ability to transport but a few commodities, principal among which are petroleum products."

Commissioner Knudsen asserted that the Commission had subordinated water and motor carriers to the railroads. He analyzed the Pacific Northwest petroleum transportation struggle as arising from the pipeline, which had created a competitive situation requiring some stabilizing action by the Commission.

The dissenting Commissioner found that the majority decision violated the national transportation policy because:

> "In my opinion, it is demonstrated by the record that protestants will be more endangered by these substantial decreases in railroad rates than the railroads would be if the status quo were preserved in the interest of better rate stabilization. National de-

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[13] On identical evidence the Washington Public Service Commission also reached an opposite conclusion from the majority report. *Washington Public Service Commission* v. *North Pacific Coast Freight Bureau.* Cause No. T-8917, decided December 18, 1953. The Washington Commission found "that the rails have not proven as required by the statute that the proposed rates are just and reasonable for state wide application as proposed." However, because of competitive necessity the Washington Public Service Commission abandoned its policy of maintaining parity between truck and rail rates to points requiring parity between intrastate and interstate traffic, but elsewhere denied the reduction.

> fense requires the presence of all kinds of carriers, to be available in the event of a defense emergency. Quite obviously the unsupported findings in the conclusion of this report were thought necessary because of the decision of the Federal Court in *Cantlay & Tanzola, Inc.* v. *United States*, 115 F. Supp. 72."

and he concluded:

> "* * * there is substantial evidence of defense necessity under the terms of the national transportation policy upon which the Commission could make a finding, if it chose that the national defense is best served by not allowing the railroads to foster what might well develop into another local petroleum war."

* * * * *

This court has a limited function. It is not a rate making body and does not measure the judgment of the Commission against its own judgment. The Commission is the expert body charged by Congress with the duty of regulating transportation rates.

In a series of decisions the Supreme Court has held that the Commission must make findings characterized as "jurisdictional", "quasi-jurisdictional," "indispensable" or "basic". Judge Learned Hand reviewed these decisions in *Baltimore & Ohio R. Co.* v. *United States*, 22 F. Supp. 533 (N.D. N.Y., 1937) at page 537:

> "The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in *Florida* v. *United States*, 292 U.S. 1, 54 S. Ct., 603, 78 L. Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. 'Jurisdiction' is a treacherous word; we are not clear that the Commission's jurisdiction is not involved; but in any event in *United States* v. *Baltimore & Ohio R.R.*, 293 U.S. 454, 464, 55 S. Ct. 268, 272-79 L. Ed. 587, it was expended to 'quasi-jurisdictional'

which was meant to cover all 'indispensable' facts; and in *United States* v. *Chicago, Milwaukee, St. Paul & P. R.R. Co.*, 294 U.S. 499, 504, 55 S. Ct. 462, 464, 79 L. Ed. 1023, the phrase, 'basic or quasi-jurisdictional facts' was substituted, as in *Morgan* v. *United States*, 298 U.S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded."

Orders of the Commission not supported by proper findings cannot be sustained. The Supreme Court in *Florida* v. *United States*, 282 U.S. 194, 215 (1931) held:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions or fact as it may permit."

See also *United States* v. *Chicago Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499 (1935), *Atlanta & Saint Andrews Bay R. Co.*, v. *United States, supra*, 5 U.S.C.A. Sec. 1077 (b).

The Commission is governed by the legislative instruction set out in the national transportation policy. *King* v. *United States*, 344 U.S. 254, 263-264 (1952); *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 434-435 (1951); *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 66 (1945).

Findings as to the national transportation policy are basic or quasi-jurisdictional in nature. While this court may not be qualified to determine which program will best promote the public interest in accordance with the national transportation policy, the Commission must make sufficient findings for us to determine whether it has applied "its familiarity with transportation problems to these conflicting considerations." *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 314 (1953).

Only one finding relative to the national transportation policy was not of the type condemned in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (D. Mass. 1951), aff'd. 342 U.S. 890, as being merely a statement of the Commission's ultimate conclusions. This finding was that the railroads "would be entirely eliminated as carriers of these products to destinations in the States of Washington, Idaho, and Oregon, contrary to the national transportation policy and the national defense." It is basic only if supported by other findings, such as a finding that the loss of this traffic would jeopardize the financial condition of the railroads.

Various provisions of the national transportation policy were merely noted but not considered by the Commission. For example, there are no basic findings concerning "developing, coordinating, and preserving a national transportation system by water, highway, and rail."

The Commission considered the motor carriers' contention that the proposed reduction would force them out of the petroleum carrying business and answered it by the suggestion heretofore quoted that the motor carriers could continue to operate by maintaining the higher rates to and from communities or areas in communities which the railroads do not serve. We doubt the propriety or legality of such suggestion.

A carrier may institute rates yielding a revenue below that which a public body could compel it to accept, *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 379 (1936), but such rates must now be in accord with the national transportation policy. The burden of proving that a change in rate or classification is just and reasonable is upon the carrier making the proposal. 49 U.S.C.A. Sec. 15(7).

The Commission, relying upon Exhibit 52, found that the proposed rates were just and reasonable and would not cast

a burden upon other traffic. Exhibit 52 is a statistical summation of system average expenses of the railroads and their expected revenues from the proposed rates.

The Commission recognized that system average figures were open to criticism and were not a satisfactory basis for any exact finding. However, it found that:

> "... The proposed rates would produce net operating revenue per gross-ton mile ranging from 18 to 853 per cent more than the corresponding revenue received by them from all other commodities."

It also found that when such a wide margin for error exists, it is proper to conclude that the proposed rates will be highly remunerative.

The Commission misread Exhibit 52. That exhibit does not show that the expected revenues from the proposed rates would range from 18 per cent to 853 per cent "more" than the system average expenses, but rather that the expected revenues would range from 18 to 853 per cent "of" the system average expenses. In other words, instead of the expected revenues all being in excess of system average expenses, between certain points they are less than one-fifth of the system average expenses.

Nor did the Commission make any finding comparing average expenses in the affected area with the proponents' system average expenses. In the proceeding which resulted in *Scandrett* v. *United States*, *supra*, the Commission found that expenses in Washington and Oregon, including pro rated overhead items, were respectively 3.6 and 3.8 mills per gross ton mile, while the system average expenses were only 2.7 mills per gross ton mile. We do not know whether the Commission found that this disparity exists today.

The misreading of Exhibit 52 and the necessity of more accurate cost studies become even more significant when

the supposed excess yield from the proposed rates is examined on the principal routes. For example, on the Portland to Pasco to Spokane route, expected revenues range from 1½ to 3 times the system average expenses, depending upon the particular carrier. Even though precision or exactness is not required, the Commission must have some reasonable basis for determining the revenues to be produced by a proposed rate.[14] *Florida* v. *United States*, 292 U.S. 1 (1934). There is no such evidence in this record.

In addition to the total failure of proof to support the Commission's findings that the proposed rates are just, reasonable and compensatory, the conclusions made by the Commission concerning the national transportation policy were not supported by the evidence.

Except for the one contention that they would be wiped out as petroleum carriers and hence lose revenue, the railroads introduced no evidence from which the Commission could find that the proposed rates were in accord with the national transportation policy.

On the other hand, the evidence of the barges and motor carriers as well as of the farm groups and other interveners showed that survival of the barge and truck lines was necessary for agricultural marketing and national defense. Farm cooperative representatives testified that because the railroads were unable to furnish adequate service during the harvest season, their members were forced to store wheat on the ground. Unlike the railroads, the barges were able to rapidly load large quantities of wheat, which en-

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[14] We recognize that the Commission has the right to select and determine its own standards of proof. It may be significant that in a prior study over the major route involved in these proceedings, *Petroleum Between Portland and Spokane P. & S. Ry. Points*, *supra*, actual cost figures which have long been recognized as more desirable, were furnished the Commission.

abled the marketing cooperatives to function efficiently. A Department of Agriculture representative confirmed the testimony of the farm cooperative witnesses that the national transportation policy was involved in this case. This testimony is significant if the future operations of barges on the Columbia River is dependent upon their continuing to carry both wheat and petroleum.

Barge and truck operators testified to their services in regard to national defense. For a period of two years during World War II, Pacific Northwest petroleum needs were served exclusively by barges and trucks. At the present time, barge service permits the large scale movement of high explosives without passing through populated centers. Motor carriers are now rapidly moving aviation fuel between air bases in order to facilitate flights of large numbers of military airplanes.

The record, therefore, shows that the Commission, had it chosen, could have made supporting findings relating to the national transportation policy. However, it neither accepted nor rejected the evidence which we have briefly summarized.

The proposed rate structure was based primarily on an attempt to meet the combined barge-proprietary truck cost from Portland to Pasco to Spokane. The proposed 35¢ rail rate is based upon a 15.5¢ barge cost and Standard's proprietary truck cost between Pasco and Spokane of 19.5¢. The Commission found that the proprietary trucks are operated on such an efficient basis that common carriers by truck are unable to offer lower rates than the cost of proprietary operation. Common carrier truckers testified that they had to maintain equipment to handle fluctuating shipments. Although not essential to our decision, we question whether there is a distinction between reducing railroad rates to end competition from a petroleum pipe line to the

detriment of competing common carriers, and similarly reducing railroad rates to end competition from these proprietary trucks. Both the courts and the Commission have prohibited the railroads from lowering rates to end pipeline competition to the detriment of competing common carriers. *Cantlay & Tanzola* v. *United States, supra, Petroleum Products from Salt Lake City to Spokane, supra.*

In addition to the general rate reduction, the railroads proposed to reduce the shipping weight of affected petroleum products by 15 per cent. The weight reduction would result in a rate reduction. We do not believe that this reduction is severable from the whole plan proposed by the railroads.

The Commission's criticism of the inadequate evidence offered by barge and truck operators as well as by the railroads is well founded. The Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with "other interested and presumably better informed agencies of the Government as to particular questions." *Cantlay and Tanzola* v. *United States, supra,* 81. However, the record does not disclose that any of these courses was followed in this case. The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.

The temporary restraining order and injunction heretofore issued will be made permanent. Attorneys for plain-

tiffs shall submit findings of fact, conclusions of law and a judgment in accordance with this opinion.

WALTER L. POPE,
Circuit Judge.

CLAUDE MCCOLLOCH,
District Judge.

GUS J. SOLOMON,
District Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 566

WARD TRANSPORT, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered on November 1, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside a Com-

mission order. The contested order approved establishment of rail rates, lower than the corresponding motor carrier rates, for transportation of refined petroleum products between points in Western Trunk Line Territory for distances of over 75 miles.

The Commission's order grew out of tariffs filed by ten railroads, to become effective October 1, 1950, providing for a reduction in their interstate rates for transporting petroleum products in tank-car loads from refineries and pipeline terminals in Colorado and Wyoming to destinations in these States and in western Kansas, Nebraska, and South Dakota. The proposed rates were generally about 1.5 cents per 100 pounds below the then prevailing tank-truck and rail, tank-car rates from and to the same points. On protest by appellants—motor carriers operating in competition with the railroads—the Commission, acting under Section 15(7) of the Interstate Commerce (49 U. S. C. 15(7)), suspended the proposed rates and scheduled a hearing to determine their lawfulness.*

After full administrative proceedings, in which appellants participated, the Commission found that the railroads were at a competitive disadvantage under the existing equal rates; that the proposed differential between rail and truck rates was not greater than required to redress the disadvantage; that the lower rates were compensatory for hauls over 75 miles, but not compensatory for

* The railroads voluntarily suspended the effective date of the tariffs beyond the 7-month period provided for in the Act. 49 U.S.C. 15(7).

shorter distances; and that approval of the lower rates for the longer distances would preserve the inherent advantage of rail transportation found to exist over such distances, while disapproval of the lower rates for shorter hauls would preserve the inherent advantage of motor carriers found to exist for such distances. *Petroleum from Colorado and Wyoming to Western Trunkline Territory*, 289 I. C. C. 457, 465-466.

On appeal, the district court unanimously sustained the Commission's order. The court held that the order had the support of adequate findings, which in turn were "supported by substantial evidence", and that the Commission's decision is not "arbitrary or capricious" or "contrary to law" (Juris. Statement 25-26).

We submit that the court's conclusions are plainly correct, and that this appeal presents no question of substance warranting further review by this Court.

1. Appellant contends (Juris. Statement 2-3, 9-11) that the Commission's findings that the lower rates would be compensatory for hauls of over 75 miles was not based on substantial evidence because the railroads did not introduce evidence showing their operating costs on the particular traffic involved. But the district court noted that the statistical evidence before the Commission showed that, for distances over 75 miles, the proposed rates would yield revenues substantially double the operating costs of the defendant railroads on their overall traffic. The court held that this evidence adequately supports the Commission's finding that the

proposed rates would yield revenue in excess of operating costs and would be compensatory and that, in view of this evidence, "a detailed cost analysis" was not requisite to the validity of the finding. The court also called attention to the fact that there was direct testimonial evidence that the reduced rates would be compensatory (Juris. Statement 24-25).

Illinois Commerce Commission v. *United States*, 292 U. S. 474, presented the question whether an order of the Interstate Commerce Commission, issued in 1933, should be set aside because the Commission had relied on a 1926-1927 cost study and had declined to make a new study to reflect alleged changed conditions. This Court, in affirming the Commission's order, said (p. 481):

> Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. * * * As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts.

Appellants cite *Northern Pacific Railway Co.* v. *Department of Public Works*, 268 U.S. 39, as holding that average cost figures may not be employed in determining point-to-point costs in rate hearings. But the situation which was there considered is very different from the present one. In the *Northern Pacific* case the average figure on which the

rate-making body had relied represented a composite average of the operating costs of four railroad systems, and this composite figure was made the basis of decision in the face of "fairly specific, direct, and comprehensive" evidence presented by the railroads as to their operating costs on the particular traffic involved in the rate proceeding. 268 U. S. 39, 43-44.

The district court also noted that the fact that the proposed lower rail rate was compensatory over the longer distances, taken with the motor carriers' own evidence that their costs for distances over 75 miles were higher than the existing rail and truck rates, was ample to demonstrate the inherent advantage of rail transportation for the longer distances, and thus to support the Commission's conclusion on this point (Juris. Statement 24).

2. Appellants urge that the Commission failed to make necessary findings as to the adverse effect of the differential rate on motor carriers and their operations as part of the national transportation system (Juris. Statement 3, 11-12). However, it is settled that the Commission need not make detailed findings of fact in non-damage cases, so long as the "essential basis of its judgment is sufficiently disclosed in its report." *Alabama Great Southern Railroad Co.* v. *United States,* 340 U. S. 216, 228. Here the Commission's action was aimed at striking a balance between two forms of transportation so closely competitive that any favorable effect as to one necessarily meant adverse effect as to the other. As the district court states, "the Commission by its positive findings impliedly made

the negative findings which the truck companies insist should have been made" (Juris. Statement 25). And, unlike the report of the Commission reviewed in *Cantlay and Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S. D. Calif.), which appellants cite (Juris. Statement 12), its report here shows that the Commission considered the national transportation policy declared in the Interstate Commerce Act, and disapproved lower rail rates for the shorter hauls in order to preserve, in accordance with the policy so declared, "the inherent advantages" of truck transportation respecting such hauls (Juris. Statement 43).

3. Appellants question whether the Commission's findings (Juris. Statement 42) that the respondent railroads "cannot successfully compete wtih the motor carriers at equal rates, and that [for the longer hauls] the proposed rates are not lower than necessary to meet the truck competition" are supported by substantial evidence (*idem* 3-4, 13-14). But it is the weighing of conflicting evidence requiring expert judgment that is the special function of the Commission, *New England Divisions Case,* 261 U. S. 184, 203-204, and the district court, reviewing "undisputed evidence" as to the changes which have occurred in recent years in the relative amounts of petroleum traffic handled by rail and by truck (*idem* 22-23), concluded that the "record and evidence abundantly justify the finding of the Commission that in the movements here involved the railroads cannot compete with the tank-truck carriers on a parity of rates" (*idem* 22).

4. Appellants also contend that the Commission, in referring to reports in similar proceedings involving competitive rates between rail and truck carriers in other areas, thereby treated the records in such proceedings as evidence in support of its present findings. The court below held that the Commission's "findings demonstrate that the factual basis for its order was the record before the Commission in the present case," and the court, citing *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 529, held that the Commission "had the right to refer to experience in other cases as a guide for the application of its expert knowledge in a particular case" (Juris. Statement 26).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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FEBRUARY, 1955.

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IN THE

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OCTOBER TERM, 1954.

No. 566

WARD TRANSPORT, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

MOTION TO AFFIRM.

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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 566.

WARD TRANSPORT, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

MOTION TO AFFIRM.

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court appellee railroads[1] move the Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the

1. The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago and North Western Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railroad Company; The Colorado & Wyoming Railway Company; The Denver and Rio Grande Western Railway Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Union Pacific Railroad Company.

decision of the cause depends are so unsubstantial as not to need further argument.

In support of their motion these appellees respectfully show:

I.

Points 1 and 2 (page 9) of Appellants' Statement as to Jurisdiction raise the question as to whether the Commission's findings are supported by substantial evidence, particularly those findings relating to relative cost of service by rail and motor carrier.

The Commission had before it considerable evidence with respect to the relative costs of service of both modes of transportation but appellants' attack upon the Commission's findings is based upon the contention that the Commission should not have reached the conclusions which it did unless it had before it certain other types of evidence which the appellants contend the Commission should have had before it.

Included with the evidence which the Commission had before it was a cost analysis submitted by the motor carriers which showed that for distances beyond 75 miles in interstate operations the motor carrier rates are non-compensatory, that is, their costs exceed their rates. Along with such evidence the Commission had before it evidence more than sufficient to conclude that the proposed rail rates are compensatory. A necessary corollary of that finding is one that the rail costs are lower than the motor carrier costs for distances over 75 miles when consideration is given to the fact that both rail and motor carrier rates are on a parity.

It is true that the railroad appellees did not submit a detailed cost study purporting to show the precise cost of handling petroleum traffic in this area. An attempt to

make such a detailed cost analysis of this particular traffic over the lines of the appellee railroads between the origins and destinations involved would have been unnecessary and superfluous. To devote the time and expense necessary to making such a detailed cost study would not have revealed anything which the evidence does not already reveal with respect to the relationship of rail and truck costs for distances greater than 75 miles.

Appellee railroads contend that the evidence which the Commission has before it, including evidence physically introduced into the record and such evidence as the parties stipulated the Commission might refer to in reaching its decision was ample to support its conclusions.

The Commission had before it a comparison of the level of the proposed rates with other rates prescribed by it on the same commodities in other areas. By stipulation of the parties it had before it for consideration all the annual quarterly and monthly operating reports, the commodity reports, and the operating expense and revenue reports of the appellee railroads on file with the Commission. It had before it an exhibit showing revenue and expense statistics for each of the appellee railroads showing the cost of handling all traffic, including car-mile and ton-mile costs, and the cost of handling all traffic on an "added traffic" basis which is generally accepted to be about 50% of the average cost of handling all traffic. This exhibit showed that the costs of appellee railroads were only about one-half of the earnings which the proposed rates would produce. With the average earnings on this traffic being approximately double the cost of handling all traffic it is not necessary for the Commission to have a detailed cost analysis before it in order to come to the conclusion that the proposed rates are compensatory, or, in other words, that they are above costs. With the truck costs

being higher than their rates and the rail rates being above costs, there was sufficient evidence for the Commission to make the finding which it did.

It is not necessary in a proceeding of this kind that the Commission have before it evidence of the type and character for which appellants contend.

In *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, this Court said (page 481):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the confidence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts. See *Manufacturers Railway Company* v. *United States*, 246 U. S. 457; *Assigned Car Cases*, 274 U. S. 564."

In *Motor Freight Express* v. *United States* (February 17, 1954), 119 Fed. Supp. 298 (District Court, M. D. Pennsylvania), the court said (page 305):

> "The question of the power of an administrative agency to draw inferences from proven facts was settled by *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793 (pages 800, 804-805). 'An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which led to the creation of such Boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.

> • • • Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proven and what is inferred.' Here there is obviously sufficient rational connection between what the Commission found to have been proved and what is inferred."

It was not even necessary for the Commission to make a finding with respect to relative costs of service in order to prescribe a differential of rail rates under truck rates. That matter was decided by this Court in *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216 (1951), where this Court said, at page 223:

> "Neither the Commission or this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate or differential."

In that same case, this Court also said at page 224:

> "The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission." Citing *Ayrshire Corporation* v. *United States*, 335 U. S. 573, 593; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535-536.

Also in the same case this Court said, at pages 224-225:

> "Competition was adjudged by the Commission to be worth preserving. That judgment was legitimately rested on relevant factors other than lesser cost of service. • • • We do not say that relative costs, when properly supported by evidence, are not a matter to be considered, but we cannot say that the absence of that factor is fatal."

II.

Point 3 (page 11) of Appellants' Statement as to Jurisdiction is based on the contention that the Commission failed to make findings with respect to the effect of the approved rates on motor carrier traffic, contrary to the National Transportation Policy.

The allegation that the proposed rates will divert traffic from appellants goes to the question of the wisdom of the Commission's decision. As this Court said in *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, 470, it is the power to make the order, not the wisdom of it that is the question. This Court has also stated on many occasions that it is not the court's function to weigh the evidence or consider the wisdom of the Commission's order when the court might have come to a different conclusion on the same evidence. *New England Divisions Case*, 261 U. S. 184, 204.

There is no rule of law nor any provision of the National Transportation Policy that requires the Commission to prohibit reductions in rates merely because such reduction may tend to attract traffic from other forms of transportation. There is no rule which prohibits the Commission from fixing minimum rates for rail carriers which are lower that the *costs* of competing motor carriers. There is nothing in the law which requires that rates of all forms of transportation must be the same as those of the highest cost agency.

If the rates are found not to violate any provisions of the Interstate Commerce Act, an order permitting such rates to become effective should not be enjoined merely because of a claim of damage on the part of the motor carriers. Rates are not unlawful merely because trucks assert the claim that they cannot meet such rates at a profit.

But of greater significance is what the record in this case shows as to fact versus speculation. What this record shows is the fact with respect to the effect of the parity of rates and speculation as to the effect of a differential. The fact is that the railroads cannot compete with the tank truck carriers in the territory under consideration on a parity of rates. The opinion—of the motor carriers—is that a differential will cause unwarranted diversion of traffic. But the evidence shows that a parity of rates does not provide equal opportunity for the competing forms of transportation fairly to seek the traffic in this area.

It is not necessary for the Commission to make findings on every argument and contention advanced by appellants.

The affirmative findings made by the Commission in its report completely took care of the alleged failure of findings contended for by the motor carriers.

In *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216, this Court said (page 227):

> "The Act does not require the Commission to make detail findings of fact, except in a case where damages are awarded. *Manufacturers Railroad* v. *United States*, 246 U. S. 457, 487, 489-490. The statute requires the Commission only to file a written report stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report."

It is not necessary for the Commission to make specific findings on every aspect of the National Transportation Policy in each and every case which comes before it. In fact, it is doubtful if it need made any findings at all on that subject. See *American Trucking Associations* v. *United States*, 344 U. S. 298. That case arose out of a Commission order prescribing certain rules for leasing of motor vehicles. In response to the contention that the order vio-

lated the National Transportation Policy, this Court said (page 313):

> "Regulation under the Act is there declared to be in the interests of the preservation of the inherent advantages of all modes of transportation, and of an economically sound, safe, and efficient industry. (Citing cases.) But no overly-nice distinction between law and policy is needed to support the view that the question is hardly one for the courts; it is clear that the rules represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission has applied its familiarity with transportation problems to these conflicting considerations."

Nevertheless, a reading of the Commission's report in this case demonstrates that the Commission was cognizant of the National Transportation Policy when it found that for distances up to 75 miles motor carriers had an inherent advantage, which, under such policy, must be preserved. The Commission further found that for distances beyond 75 miles motor carrier rates as low as rail rates result in unprofitable operations for the motor carriers. For the motor carriers to maintain rates so low as to be noncompensatory is not an "inherent advantage" which must be preserved. There is nothing in the National Transportation Policy which requires railroad rates to be maintained on a level which will insure continued unprofitable operations by motor carriers. For the Commission to countenance such a situation would have been contrary to the National Transportation Policy. What appellants are contending here, in effect, is that the National Transportation Policy requires the rates of all transportation agencies to be maintained at the level of the high cost agency.

III.

Point 4 (page 13) of Appellants' Statement as to Jurisdiction goes to the question of whether the record contains substantial evidence to support the Commission's finding that it is necessary for rail rates to be 1.5 cents lower than prevailing truck rates in order to make rail rates competitive with the truck rates.

Appellants here are merely seeking to have the court substitute its judgment for that of the Commission with respect to the conclusions reached from the evidence before it.

Appellants disagree with the Commission's judgment as to what are just and reasonable rates and want the court to substitute its judgment for that of the Commission.

Under a parity of rates the Commission found that rail carriers could not compete with motor truck service and that a differential under such truck rates was necessary.

The Commission had before it evidence that under the present parity of rates the motor carriers handled 90% of the traffic, that shippers by rail are under certain financial disadvantages created by the fact that they must furnish their own facilities for transportation including tank cars and places for the receipt and delivery of rail freight. Appellants contend that shippers will not pay a premium for motor carrier service but the record conclusively shows that the same shippers will not pay *as much* for rail service as they will for motor carrier service. Under these circumstances it is essential, and the Commission so found, that the rail rates must be differentially under motor carrier rates if the rail carriers are to compete for this traffic.

IV.

Point 5 (page 14) of Appellants' Statement as to Jurisdiction contains an assertion that the Commission's findings were based on evidence introduced in other proceedings. This assertion has no merit whatsoever.

Appellants state that "the final circumstance which shows the insubstantiality of the evidence to support the Commission's finding and order involves its recital in general terms of experience in other cases in other unnamed territories as grounds for the establishment of the 1.5 cent differential in favor of railroads in the territory involved."

The Commission did refer to the fact that in other territories where reduced rates have been filed to meet tank truck competition, the Commission has found as a fact that the railroads cannot compete successfully with the tank truck carriers at equal rates. However, in the instant case, the Commission's language clearly indicates that its decision rests upon findings based on the evidence in this case, as see the finding made on page 15 (page 42 of Statement) of the report:

> "* * * the record is convincing that in the territory here considered, the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory except for the shorter hauls."

Nothing could be clearer than this statement as evidence that the Commission's decision in this case rests squarely and wholly upon the findings based on the evidence presented in the record in the instant proceeding.

Appellants cite a portion of the lower court's decision dealing with that matter but fail to include the preceding sentences which throw an entirely different aspect on the

quote contained in the Statement as to Jurisdiction (p. 14) which is taken out of context.

The entire quote is as follows:

> "The plaintiffs further complain that the report improperly referred to and relied upon similar findings in similar proceedings which determined questions of competitive petroleum rates as between motor and rail carriers, but which were not involved in the instant proceeding. The Commission did refer to other like cases in its report, but in so doing it did not decide the instant case on facts established in the other cases. Its findings demonstrate that the factual basis for its order was the record before the Commission in the present case. The Commission is an expert body within its field. Part of that experience comes from its experience in previous cases. Certainly, in our opinion the Commission has the right to refer to experience in other cases as a guide for the application of its expert knowledge in a particular case. See *United States* v. *Peirce Auto Freight Lines, supra,* 327 U. S. at page 529."
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> "It is our conclusion that the findings of the Commission are based on the record in the instant case and are supported by substantial evidence; that the decision is not contrary to law and is in no respect arbitrary or capricious, and that the relief sought by the truck companies must be denied. Judgment will be entered accordingly."

Conclusion.

There was substantial evidence in the record to support the Commission's judgment in this case. Under such circumstances there is no substantial question presented for consideration by this Court and these appellees respectfully request that the decision of the lower court be affirmed.

Respectfully submitted,

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February, 1955.

No. 566. WARD TRANSPORT, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Colorado. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nuel D. Belnap* and *Albert L. Vogl* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Walter R. McFarland* and *Eldon Martin* for the Atchison, Topeka & Santa Fe Railway Co. et al., appellees. Reported below: 125 F. Supp. 363.